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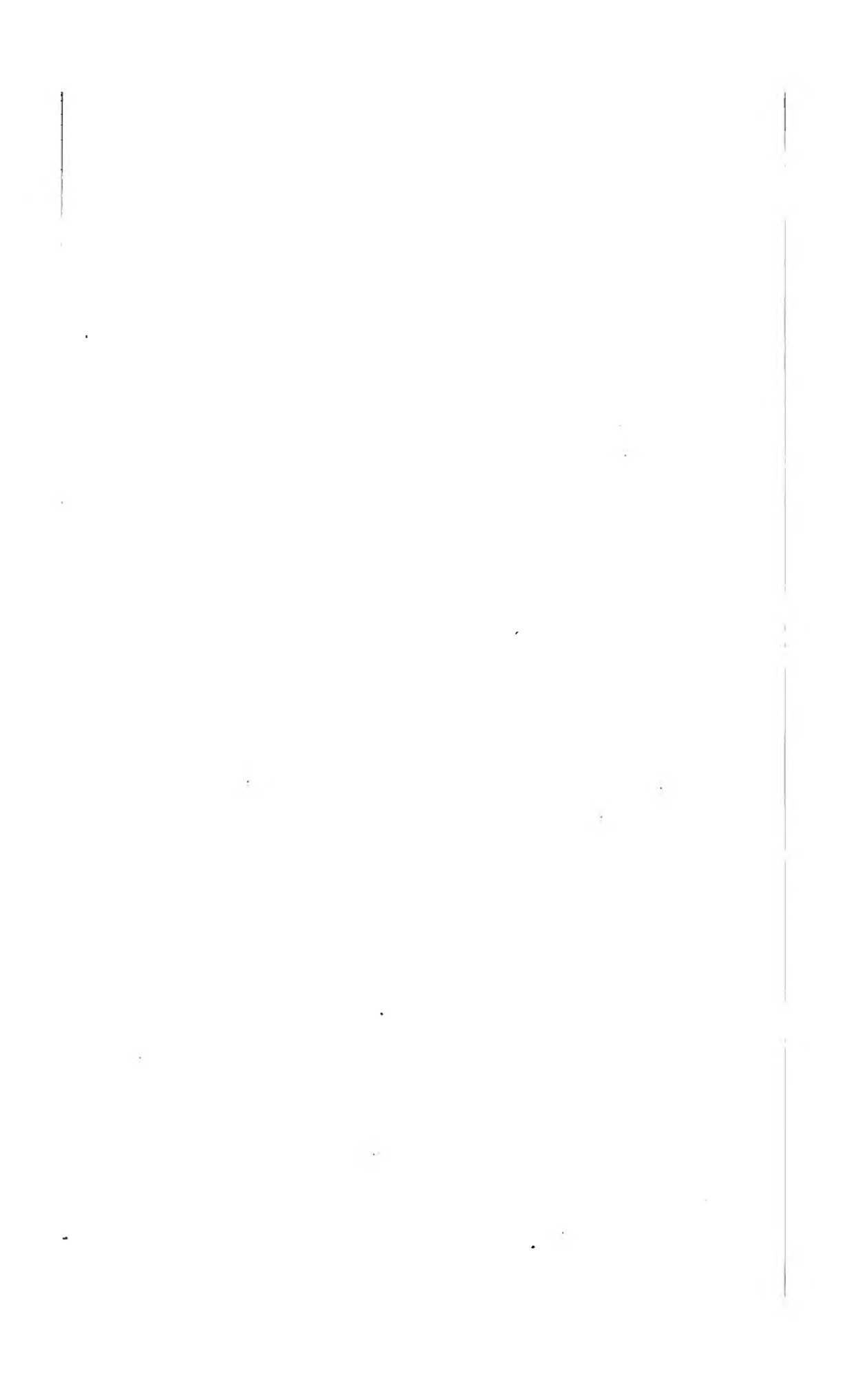
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PROVIDENCE, May 1, 1854.

P R E F A C E

TO THE LAST (FOURTH) EDITION.

SUCH were the author's engagements, that a considerable period elapsed, after the final disposition of the preceding edition of the following work, before he was able to undertake the one here presented to the public. The ultimate result of this last enterprise, is something far different from a mere revision of the former editions. The arrangement of the subject-matter, it will at once be perceived, is essentially new, while in bulk it is vastly increased. The very material change in the arrangement was suggested by a renewed and further consideration of the subject, and it is designed to render it more deductive, and, therefore, more advantageous, and better entitled to public favor.

The author has been led also to perceive, while engaged in the revision of the authorities contained in the preceding edition, that they may be treated in the present work, in a manner more circumstantial, and more explanatory of the facts and principles to which

they relate. What, however, has contributed still more to the enlargement of the work, is the copious accumulation of judicial authorities, in further and important illustration of those which had previously been cited. But, beyond this explanation of its great increase in size, the addition which has been made to the use of water, as a motive power, has thrown open new sources of litigation, and has thus associated the subject more largely with the rudiments of general jurisprudence. This extended use has required a judicial construction of particular grants, and of written and unwritten contracts, of legislative acts and of constitutional law, which, while it has much enlarged the volume, has vindicated the soundness of the assertion of Lord Mansfield, that the predominating characteristic of the Common Law is, that it is a *science of principles*.

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In the Appendix will be found the statutes of Massachusetts, Maine, and Rhode Island, authorizing the owners and occupants of mills to overflow, subject to certain liabilities, the lands of other persons. The statute of Virginia, in relation to the same subject, which

is substantially different in its provisions from those just named, is also given. That of Kentucky, and those of other western and southern States, are modelled so much after the law of Virginia, that it has been deemed inexpedient to swell the size of the volume by inserting them. The Appendix also contains forms of declarations, to be used in actions for injuries done to, or by means of, watercourses.

Following the Appendix is an Index, though this has been rendered almost superfluous, as so much attention and care have been bestowed on the arrangement and fulness of the Table of Contents.

PROVIDENCE, June 25, 1850.

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LAW OF WATERCOURSES.

LAW OF WATERCOURSES.

CHAPTER I

MEANING OF WATERCOURSE, AND OF THE GENERAL RIGHT OF PROPERTY THEREIN.

1. Meaning of Watercourse.
2. How the Private Right of Property in a Watercourse is derived.
3. How the Private Right of Property in a Watercourse is apportioned between opposite Riparian Owners.
4. When Persons become Riparian Owners.
5. Difference between a Boundary on a Watercourse, and a Boundary on a Pond or Lake.

1. *Meaning of Watercourse.*

§ 1. In considering movable and running water in reference to the right of property therein, and as something subservient to rules of jurisprudence, it may be distinguished as *tide* or *inland*. With the former the present work has nothing to do, further than to explain, before its conclusion and when it becomes more demanded, the legal distinction between them.

§ 2. Of bodies of water issuing *ex jure naturæ* from the earth, and by the same law pursuing a certain direction until they form a confluence with *tide-water*, there are known in the law two kinds, viz., those in which the proprietary interest is altogether private, and those in which it is both private and public; or those in which the private right of property is subser-

vient to the right of public use.¹ No proprietary interest in streams of inland water so diminutive in their natural state, that they cannot be used as *boatable*, or for the transportation of property, (even though by artificial means, at the expense of the owner, they may be made of such public use,) becomes vested in the public.²

§ 3. Of the two descriptions of running water (not tide water) mentioned in the preceding section, it is proposed to treat under the name of "Watercourses;"³ though very commonly they are denominated "rivers" or "rivulets," according to their magnitude.⁴

§ 4. A watercourse consists of *bed, banks, and water*;⁵

¹ It will be shown, in a subsequent portion of the work, that all flowing water is by the law regarded in three distinct points of view; namely, 1. Where it is altogether private. 2. Where it is private, and at the same time subject to public use. 3. Where the use and property are both public.

² *Wadsworth v. Smith*, 2 Fairf. (Me.) R. 278.

³ "And they shall spring up as among the grass, as willows by the watercourses." Isaiah xliv. 4.

⁴ The word "streams," in the English statute of Sewers, is said not to apply to rivers, pools, ponds, &c., because those waters have their peculiar banks, bounds, and channels; but streams are currents of water flowing independently over the land, and they are placed under the control of the commissioners of sewers. But *rivers*, although not expressly mentioned, are yet within the survey. A river is defined to be "a running stream pent in on either side, with walls and banks." Woolrych on Sewers, 51. Mr. Sergeant Callis lays it down broadly that rivers, and their channels, waters, and banks, are all fully within the laws of sewers. Callis on Sewers, 77. This must, however, be understood of such rivers as are immediately beneficial to navigation, or to the public. Springs make rivers, and these united form brooks, which, coming forward in streams, compose great rivers that run into the sea. Locke, cited in Johns. Dict. 4to ed. "River."

⁵ Hale's Treatise, De Jure Maris, &c.; *Starr v. Child*, 20 Wend. (N. Y.) R. 149; *Gavit's Adm'rs v. Chambers*, 3 Ohio R. 495. A bank of a river is that space of rising ground above low-water mark which is usually covered by high water, and the term, when used to designate a precise

yet the water need not flow continually; and there are many watercourses which are *sometimes* dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which, at certain seasons is dried up, and those occasional bursts of

line, may be somewhat vague and indefinite. *Howard v. Ingersoll*, 17 Ala. R. (N. S.) 780. Bouvier (1 Law Dict.) says, "Banks of rivers contain the river in its natural channel, when there is the greatest flow of water." The Supreme Court of Louisiana have held, "That the vendee of a riparian estate acquires a qualified property in the bank of a river, and, consequently, the *batture* which may thereafter arise before the estate; and that the intervention of a highway does not prevent this, where the owner of the estate is bound to repair it, and the soil of it is at his risk." *Morgan v. Livingston*, 6 Mart. (La.) R. 19. CURTIS, J., in *Howard v. Ingersoll*, 13 How. (U. S.) R. p. 426, says:—"The banks of a river are those elevations of land which confine the waters, when they rise out of the bed; and the bed is that soil so usually covered by water, as to be distinguishable from the banks, by the character of the soil or vegetation, or both produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of the water, can be assumed as the line dividing the bed from the banks. The line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend on the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between its highest and least flow. Something must depend, also, upon the rapidity of the stream and other circumstances. But in all cases, the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality grows, wherever the bank is not too steep to permit such growth, and the bed being soil of a different character, and having no vegetation, or only such as exists when commonly submerged in water." The question, in this case, was as to the jurisdiction of Georgia over the Chattahoochee river; and see the learned and ingenious argument of Mr. Berrien, on p. 891 of *Ib.*, *et seq.*

water, which, in times of freshet, or melting of ice and snow, descend from the hills and inundate the country.¹

§ 4. *a.* A portion of a river may be designated as a *bay*, but it is not the less a river on account of such name. And, on the other hand, bays may be connected with rivers in such a way as to form a body of waters extending inland, and not be considered part of the river.²

2. *How the Private Right of Property in a Watercourse is derived.*

§ 5. The right of private property in a watercourse is derived, as a *corporeal right* or *hereditament*,³ from, or is embraced by, the ownership of the soil over which it naturally passes. The well-known maxim, *cujus est solum ejus est usque ad cælum*, inculcates, that land, in its legal signification, has an indefinite extent upwards;⁴ and therefore it is that a grant of it conveys to the grantee not only the "field" or the "meadow," but all growing timber and *water* standing and being thereupon;⁵ and a *stream of water* is, therefore, as

¹ Reynolds v. M'Arthurs, 2 Peters, (U. S.) R. 417; and opinion of Chan. Pennington, in 3 Green, (N. J.) Ch. R. 234.

² Per Parker, C. J., in State v. Gilmanton, 9 N. Hamp. R. 461. For the difference, in the eye of the law, between a watercourse and a *lake*, see *post*, § 41.

³ *Land* means the whole surface of the earth; *tenement* is a word of still greater extent, signifying every thing that may be holden by tenure; but *hereditament* is the largest and most comprehensive word, including not only lands and tenements, but whatever may be inherited. 1 Greenleaf's Ed. Cruise's Dig. 39; Sacket v. Wheaton, 17 Pick. (Mass.) R. 105.

⁴ 3 Bla. Com. 18 : Co. Litt. 4; 2 Brownl. R. 142.

⁵ Real property is corporeal or incorporeal. Corporeal property consists wholly of substantial and permanent subjects, all which may be com-

much the property of the owner of the soil over which it passes, as the stones scattered over it.¹ Where the lines given in a grant of land include a stream of water, the soil covered by the water, and, consequently, the water itself, will pass, although the land is not described as *aqua coöperta*.² The proprietor of adjoining lands, who is also the proprietor of the bed of a river, may grant and convey the bed of the river separate from the land which bounds it;³ but a grant of a stream of water or watercourse, *eo nomine*, will not pass the land over which the water runs.⁴

§ 6. In this country, a grant by a State conveying a tract of territory, carries with it a right of property in all the watercourses within the boundaries of the grant.⁵ A patent from the State of New York conveying territory twenty-four miles in width on the river Hudson, above tide water, with the territory described as "lying and being in and upon the banks

prehended under the general denomination of land; which Lord Coke says, in its legal signification, comprehends any ground, soil, or earth whatsoever; as meadows, pastures, woods, *waters*, marshes, furzes, and heath. It has, also, in its legal signification, an indefinite extent upwards, as well as downwards; for it is a maxim of law, *cujus est solum, ejus est usque ad cælum*. 1 Greenleaf's Ed. Cruise's Dig. 37.

¹ By the Court, in *Buckingham v. Smith*, 10 Ohio R. 288. See, also, *Bullen v. Runnels*, 2 N. Hamp. R. 255; *Canal Commissioners v. The People*, 5 Wend. (N. Y.) R. 428; *Newson v. Pryor*, 7 Wheat. (U. S.) R. 7; *Den v. Wright*, 1 Peters (Cir. Co.) R. 64; *Winthrop v. Curtis*, 3 Greenl. (Me.) R. 110; *Williams v. Jackson*, 5 Johns. (N. Y.) R. 489; *Van Gorden v. Jackson*, 5 Johns. (N. Y.) R. 440; *Pejepscot Proprietors v. Cushman*, 2 Greenl. (Me.) R. 94.

² *Browne v. Kennedy*, 5 H. & Johns. (Md.) R. 195.

³ *Den v. Wright*, 1 Peters (Cir. Co.) R. 64. And see *Ashly v. Pease*, 18 Pick. (Mass.) R. 268.

⁴ *Jackson v. Halstead*, 5 Cow. (N. Y.) R. 216.

⁵ *Lunt v. Holland*, 14 Mass. R. 149; *Middleton v. Pritchard*, 3 Scam. (Ill.) R. 520.

of Hudson river," includes the soil under the river, as far as the patent extends up and down the river.¹ In Pennsylvania all rivers and streams of water are comprehended within the charter bounds of the Province, and passed to William Penn, in the same manner as the soil; and in grants of vacant land by him and his successors, during the proprietary times, and by the Commonwealth since, streams of water not navigable, falling within the lines of a survey, were covered by them, and belonged to the owner of the tract; and such owner might convey the body of the stream to one person, and the adjoining land to another, or he might convey the adjoining land only to one, who would then be riparian proprietor to the middle of the stream.²

§ 7. In a case in the State of New York, it appeared that a valuable waterfall in the middle sprout of the Mohawk river, which falls into the river Hudson, had been destroyed by a dam erected for the use of the canals. This fall was granted in terms, as so much land covered with water, in 1752, by Stephen Van Renssellaer, and had come by mesne conveyances to the relator; there being an actual individual seisin of the fall *eo nomine* for upwards of thirty years. It was well known that the land on both sides of the fall was granted away at a very early period by the State, which had not afterwards asserted the least claim. The canal appraisers refused to allow the relator any damages, on the *sole ground* that the land

¹ Canal Commissioners v. The People, 5 Wend. (N. Y.) R. 423; and see People v. Canal Appraisers, 13 Ib. 355; Rogers v. Jones, 1 Ib. 255.

² Coover v. O'Connor, 8 Watts (Penn.) R. 470.

under water belonged to the State; but the Supreme Court granted a mandamus against the appraisers.¹

§ 8. It has, therefore, as a matter of course, been held, that the right to a watercourse is a part of the *freehold*, of which no man can be disseised but by lawful judgment of his peers, or by due process of law.² Still, no action will lie to recover possession of a watercourse, by that name; either by estimating the capacity of the water, as for so many cubical yards, or by superficial measure, for “twenty acres of water;” or by a more general description, as for “a river” or “stream of water.” The action must be for the *land* at the bottom, calling it “twenty acres of land covered by water.”³ To give execution of that which is so wandering and fugitive as running water, is indeed impracticable.⁴

¹ Tobias, *ex parte*, referred to in note to 6 Cow. (N. Y.) R. 551; and see Jennings, *ex parte*, Ib. 518.

² Gardner v. Newburgh, 2 Johns. (N. Y.) Ch. R. 162. And see Beidelman v. Foulk, 5 Watts, (Penn.) R. 308.

³ 2 Bla. Com. 18; Runnington on Eject. 181.

⁴ In Challenor v. Thomas, (Yelverton's Rep. 143, Metcalf's ed.) error was brought on a judgment given in ejectment in *Com. Carmarthen*:— And Yelverton assigned the error, because the ejectment was brought *de aquæ cursu*, called Lochar in Llandeby, and declared on the lease of David Rees ap Thomas *de quodam rivulo et aquæ cursu ut supra*. And, *per totam curiam*, the judgment was reversed; for *rivulus seu aquæ cursus* doth not lie in demand, neither doth a *præcipe* lie of it, nor can livery of seisin be made of it; for *non moratur*, but is ever flowing; nor can execution by *habere fac. seisinam* be made of it; for it is not constant to be put in possession of it: And it is like a protection *quia moratur super mare*, which is not allowable by 35 H. 6. for *mare non moratur*; but as 12 H. 7. 4, is, the action ought to be for so many acres of land *aquæ coöperta*; and ejectment well lies of a gorce or pool, for a *præcipe* lies for them, and a wife shall be endowed of the third part of the gorce, as 11 E. 3. is. But if the land under the river or water does not belong to the plaintiff, but the river only, then on a disturbance his remedy is only by action on the case on any diversion of it. In Godbolt, 157, pl. 213, it is said:—“It

§ 9. The only mode by which a right of property in a watercourse, above tide water, can be withheld from a person who receives a grant of the land, is by a reservation directly expressed or clearly implied to such effect. If the intention of the grantor is not to convey any interest in the water, or any portion of it, he can exclude it by the insertion in the instrument of conveyance of proper words for the purpose of doing so; but in the absence of such words, the bed, and consequently the stream itself, passes by the conveyance.¹

was adjudged in this court (B. R.) that an *ejectione firmæ* doth lie *de aquæ cursu*." That, probably, is a wrong report of the case in the text, as it appears to have been of the same term—Mich. 6 Jac. Bacon, Espinasse, and Selwyn state that ejectment will not lie for a watercourse or stream of water; on the authority of Yelverton and Brownlow's report of this case. So do Runnington and Adams, in their respective treatises on the action of ejectment. An ejectment has, however, been sustained for a *boilary* of salt, i. e. where there is a well of salt water, and a man has no inheritance in the soil, but only a grant of so many buckets of the water as will arise, which are called *boilaries*. Any one who withholds the buckets of water from the grantee is liable to an action of ejectment for the injury. Cro. Jac. 150, 1 Lev. 44. Reg. 227. But this is obviously different from a river which is always running; for here the water is fixed in a certain place, and within the bounds and compass of the well, and is considered as a part of the soil. So an ejectment lies *pro stagno*, for in law the word *stagnum* comprehends both land and water. Co. Litt. 5. See *post*, § 41.

¹ *Claremont v. Carleton*, 2 N. Hamp. R. 371; *Hay's Ex'r v. Bowman*, 1 Rand. (Va.) R. 420; *Waterman v. Johnson*, 3 Pick. (Mass.) R. 261; *Brown v. Kennedy*, 5 H. & Johns. (Md.) R. 195; *Gavit's Adm'rs v. Chambers*, 3 Ohio R. 495; and see *post*, Ch. V. A deed conveying to the grantee fifty acres of land, being half of a certain hundred acre lot described as bounded by a river, "said half to be taken off the width of said lot on said river," (which was at the south end,) "and so far back as to make the half of said lot, quantity and quality, as it now stands," does not convey any interest in the north end of the lot, so as to constitute the grantor and grantee tenants in common of the whole lot. If, however, such deed were construed as constituting a tenancy in common, the fact that the north and south portion of the lot had been long possessed in severalty, each party claiming a dividing line between them, with an agreed boundary on the west line of the lot, would be conclusive evidence

In a case in the Supreme Court of the State of New York,¹ it appeared, that in 1784, the country through which a river called the "Saranac" runs, was wild and uninhabited; and that a patent for a tract of land was in that year granted, bounding on the east by lake Champlain, and extending west on both sides of said river, and being seven miles square. The patent contained no other reservation than of "all mines of gold and silver,"² salt springs, lakes, and mines of salt, and carrying places upon any water communication which may be found or contained within the limits of the said land." The Court held, that, as there was no other reservation of the river, nor any restriction imposed in the use of the water expressed in the grant, the whole river within the bounds of the patent, passed to the patentee as his exclusive property.

3. *How the Private Right of Property in a Watercourse is apportioned between Opposite Riparian Owners.*

§ 10. The owners of watercourses are denominated by the civilians *riparian* proprietors, and the use of

of partition, notwithstanding the monuments to which they claimed on the east side were different. *Smith v. Powers*, 15 N. Hamp. R. 546.

¹ *People v. Platt*, 17 Johns. (N. Y.) R. 195; and see *Colvin v. Burnet*, 2 Hill, (N. Y.) R. 620.

² Not only has land, in its legal signification, an indefinite extent upwards, but, in contemplation of law, it extends also downwards, so that whatever is in a direct line beneath the surface of any land and the centre of the earth, belongs to the owner of the surface; and, therefore, if a man grants all his lands, he grants thereby all his *mines*. 2 Bla. Com. 18. See *Acton v. Blundell*, 12 M. & Welsb. R. 324; *Doe v. Freeland*, 1 T. R. 701. See *ante*, § 5, as to the maxim *cujus est solum*, &c. When the surface of land belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owners of the minerals cannot remove them without leaving

the same significant and convenient term is now fully introduced into the Common Law. The soil of the bed itself, and consequently the water, may, and most often, is divided between two opposite riparian owners; that is, the land on one side may be owned by one person, and the land on the opposite side by another. When such is the case, each proprietor owns to the middle, or what is called the *thread* of the river, or as it is expressed in Latin, *usque ad filum aquæ*.¹ There is but one difference between a stream running through a man's land, and one which runs by the side of it; in the former case he owns the whole, and in the latter but half.²

§ 11. A watercourse is considered the safest boundary of real estate, as it is a natural boundary;³ and the invariable construction in this country has been, as it has been for centuries in England, that whenever land or a mill site is sold and conveyed as being bounded

support sufficient to maintain the surface in its natural state. The owner of the surface close, while unencumbered with buildings, and in its natural state, is entitled to have it supported by the subjacent mineral strata; and if the surface subsides and is injured by the removal of these strata, although the operation of removal may not have been conducted negligently, nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. *Humphries v. Brogden*, 1 Eng. Law & Eq. R. 241, and 20 Law Journ. R. (N. S.) Q. B. 10.

¹ See Lord Hale's Treatise, *De Jure Maris*, &c., Harg. Tracts, 5; Holt's R. 499; *Tyler v. Wilkinson*, 4 Mason, (Cir. Co.) R. 397; and the authorities cited, Ante, § 5 *et seq.* The word "thread" is defined by Johnson "a small line," "any thing continued in a course." Johns. Dict. A party having made a ditch six feet wide through his land, and conveyed a part of it bounding the grantee on the ditch, it was held that the grant extended to the middle of the ditch. *Warner v. Southworth*, 6 Conn. R. 471.

² *Starr v. Child*, 20 Wend. (N. Y.) R. 149.

³ Per Washington, J., in *Den v. Wright*, 1 Peters (Cir. Co.) R. 64.

by a watercourse, the watercourse *usque ad filum aquæ* is included.¹ In numerous cases of much importance in this country, it has been declared, that the Common Law on this subject prevailed here, and that conveyances of land bounded on rivers and streams of water, (above tide water,) extend *usque ad filum aquæ*.² A grant of all the land situated east and north of a certain stream, was held to extend to the middle of the stream.³ Each riparian proprietor owns an equal share of the bed of the stream in proportion to his line on the margin of the stream, together with that portion of the bed of the stream, which lies opposite, in front of, or adjacent to, his upland ; and this in the absence of any controlling grant, will be effected by the straight lines, at right angles, which will in general be the shortest and most direct lines to the thread of the river. And it cannot well be perceived how this consideration can be influenced by the shape of the upland lot, or by the direction of its side lines back from the river.⁴

¹ *Mayo v. Quimby*, (1799) cited in 3 *Dane*, Abr. 4 ; *Hatch v. Dwight* 17 *Mass. R.* 289.

² *Palmer v. Mulligan*, 3 *Caines* (N. Y.) R. 319 ; *Canal Commissioners v. The People*, 5 *Wend.* (N. Y.) R. 423 ; *Tyler v. Wilkinson*, 4 *Mason* (Cir. Co.) R. 397 ; *Claremont v. Carleton*, 2 *N. Hamp. R.* 369 ; *Ingraham v. Wilkinson*, 4 *Pick.* (Mass.) R. 468 ; *People v. Seymour*, 6 *Cow.* (N. Y.) R. 579 ; *Hooper v. Cummings*, 20 *Johns.* (N. Y.) R. 91 ; *Arnold v. Munday*, *Halst.* (N. J.) R. 1 ; *Adams v. Pease*, 2 *Conn. R.* 481 ; *Mead v. Haynes*, 3 *Rand.* (Va.) R. 33 ; *Blanchard v. Baker*, 8 *Greenl.* (Me.) R. 253 ; *Bliss v. Rice*, 17 *Pick.* (Mass.) R. 23 ; *Waterman v. Johnson*, 13 *Pick.* (Mass.) R. 261 ; *Williams v. Buchanan*, 1 *Ire.* (N. C.) R. 535 ; *Canal Appraisers v. People*, 17 *Wend.* (N. Y.) R. 590 ; *Commissioners of Canal Fund v. Hemphill*, 26 *Wend.* (N. Y.) R. 404 ; *Child v. Starr*, 4 *Hill* (N. Y.) R. 369.

³ *Morrison v. Keen*, 3 *Greenl.* (Me.) R. 474.

⁴ Per *Shaw*, C. J., in *Knight v. Wilder*, 2 *Cush.* (Mass.) R. 199, and see *post*, §§ 55, 56.

§ 12. The same rule holds, whether a grant of land is made by a State or an individual.¹ In Maryland, the State is entitled to certain unnavigable rivers, and to the soil they occupy; and it is held by the Courts there, that if the State grants land on one of such rivers, and the grant calls for the river as a boundary, the grantee becomes riparian proprietor, and is entitled to the land the river covers *ad filum medium aquæ*; and that any subsequent grantee under the same description, is alike entitled.² Grants by the legislature of New York of islands in rivers and streams of water, where the tide does not ebb and flow, although made during a long series of years, do not justify the conclusion that the principle of the common law has not been adopted, that grants of land bounded on such waters, carry the exclusive right of the grantees to the middle thereof.³

§ 13. Lots bounding on the Oswego river and immediately below a dam belonging to the State of New York, erected for canal uses, were sold by the commissioners of the land-office as water lots bounding on the river. It was held that the purchaser of such water lots was entitled to the water privileges connected with such lots at the time of the sale, by the natural flow of the surplus water over the State dam,

¹ *Hay's Ex'r. v. Bowman*, 1 Rand. (Va.) R. 420; and *Ante* § 6 *et seq.*; *Jennings ex parte*, 6 Cow. (N. Y.) R. 518; and see the note of the reporter in the same volume, p. 536; *Arthur v. Case*, 1 Paige (N. Y.) Ch. R. 447.

² *Brown v. Kennedy*, 5 H. & Johns. (Md.) R. 195. A grantee from the State is entitled to whatever falls within the tract described in his patent; and, therefore, is entitled to alluvian accretions, and insular formations. *Ridgeley v. Johnson*, 1 Bl. (Md.) Ch. R. 316; and see *Baltimore v. McKim*, 3 Bl. (Md.) Ch. R. 453.

³ *People v. Canal Appraisers*, 13 Wend. (N. Y.) R. 355.

so far as such waters could be used, to the middle of the stream, provided the public right of navigation was not molested; and that State officers could not afterwards lease such surplus waters and authorize the lessee to prevent them from flowing over the dam, to the injury of the water privileges connected with the water lots thus sold.¹

§ 14. So, grants by the general government of the United States are construed by the Common-Law rule, unless there is something to exclude or qualify that construction. A grant by the United States of land lying upon the river Mississippi, without reservation, was held to pass to the grantee a title to the middle of the river.² So the act of Congress establishing the Mississippi river as the western boundary of the Mississippi territory, and adopting the Common Law for the government of that territory, fixed the middle of the river as the boundary line; and the rights of the riparian proprietors on the east shore of that river must be determined by the Common Law.³ In *Gavit's Adm'rs v. Chambers*, in Ohio,⁴ the Court say, "If it be assumed that the United States retain the fee-simple in the beds of our rivers, who is to preserve them from individual trespasses, or determine matters of wrong between the trespassers and themselves? It cannot be reasonably doubted that if all the beds of our rivers supposed to be navigable, and treated as such by the United States in selling lands, are to be regarded as unappropriated territory, a door is opened

¹ *Varick v. Smith*, 9 Paige (N. Y.) Ch. R. 547; and see 5 Ib. 138.

² *Middleton v. Pritchard*, 3 Scam. (Ill.) R. 510.

³ *Morgan v. Reading*, 3 Sme. & Marsh. (Mississip.) R. 366.

⁴ *Gavit's Adm'rs v. Chambers*, 3 Ohio R. 495.

for incalculable mischiefs. Intruders upon the common waste would fall into endless broils amongst themselves, and involve the owners of adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects of individual scramble, necessarily leading to violence and outrage." The United States have no other rights within the several States than as a landholder, and when they grant a portion of their domain, such rights and such only as are incident to the land, pass to the purchaser.¹

§ 15. It is, therefore, obvious, that, in respect to tenants in common, whenever they make partition, by assigning the land on one side of a watercourse to one of the co-tenants, and the land on the opposite side to the other, the two tracts are separated by the *thread* of the river.²

§ 16. Proprietors of islands own to the thread of each branch of the river, which, in its natural course divides it from the main land.³ And, where a watercourse is divided by an island, and the smaller portion of the stream dividing it descends on one side of it, and the residue on the other, the riparian proprietor of the main land by which the smallest quantity flows, is entitled to the use of no more of the water than naturally runs between his bank and the island.⁴

4. *When Persons become Riparian Owners.*

§ 17. It matters not what may be the intention of the grantor of land described as being bounded by a

¹ *Hendricks v. Johnson*, 6 Port. (Ala.) R. 472.

² *King v. King*, 7 Mass. R. 496.

³ *People v. Canal Appraisers*, *ub. sup.*

⁴ *Crooker v. Bragg*, 10 Wend. (N. Y.) R. 260.

watercourse, or by words as comprehensive or in law equivalent; the grantee in such case will hold to the thread of the river, even if such was not the grantor's intention.¹ As a reservation of a right of way in a grant of land so bounded, upon the bank of the stream, does not prevent the fee in the land from vesting in the grantee, it does not limit his riparian rights.²

§ 18. What words employed in a grant of land bounded by a watercourse, will exclude the bed of the stream, and consequently all aquatic right, has, in this country, been a fertile subject-matter of litigation. It has been settled that territory described as "lying between" two rivers, is the whole country from their sources to their mouths; and if no fork of either of them has acquired the name, in exclusion of another, the *main* branch, to its source, must be considered as the true river.³ In South Carolina it has been held that where a certain survey called "Dean's Swamp" as a boundary, the creek or main stream of the swamp was intended, and not the outer edge or margin of low marshy land that frequently bounds the main stream.⁴

§ 19. A description in a grant calling for the mouth of "Lodge's Run" as the place of beginning, thence by several courses and distances to a *stone bridge* over the Run, it being in the main road, at twelve perches north-east of a certain corner, mentioned in a deed, &c., thence down along the said Run on the southwardly side thereof to the place of beginning, the said

¹ See Ante, § 9; *Waterman v. Johnson*, 13 Pick. (Mass.) R.; *Nickerson v. Crawford*, 4 Shep. (Me.) R. 245.

² *Hagan v. Campbell*, 8 Port. (Ala.) R. 9.

³ *Doddridge v. Thompson*, 9 Wheat. (U. S.) R. 470; *Beuner v. Platter*, 6 Ham. (Ohio) R. 504.

⁴ *Felder v. Bonnet*, 2 M'Mull. (S. C.) R. 44.

described Run to be the boundary, was held proper to be applied by the Jury, and not the Court, to evidence that there was, at the date of the deed, a *wooden* bridge, and *not* a *stone* one, over the main branch, which was usually called "Lodge's Run;" and that there was a stone bridge over a gut or small branch of it, at the specified distance from the particular corner tree.¹

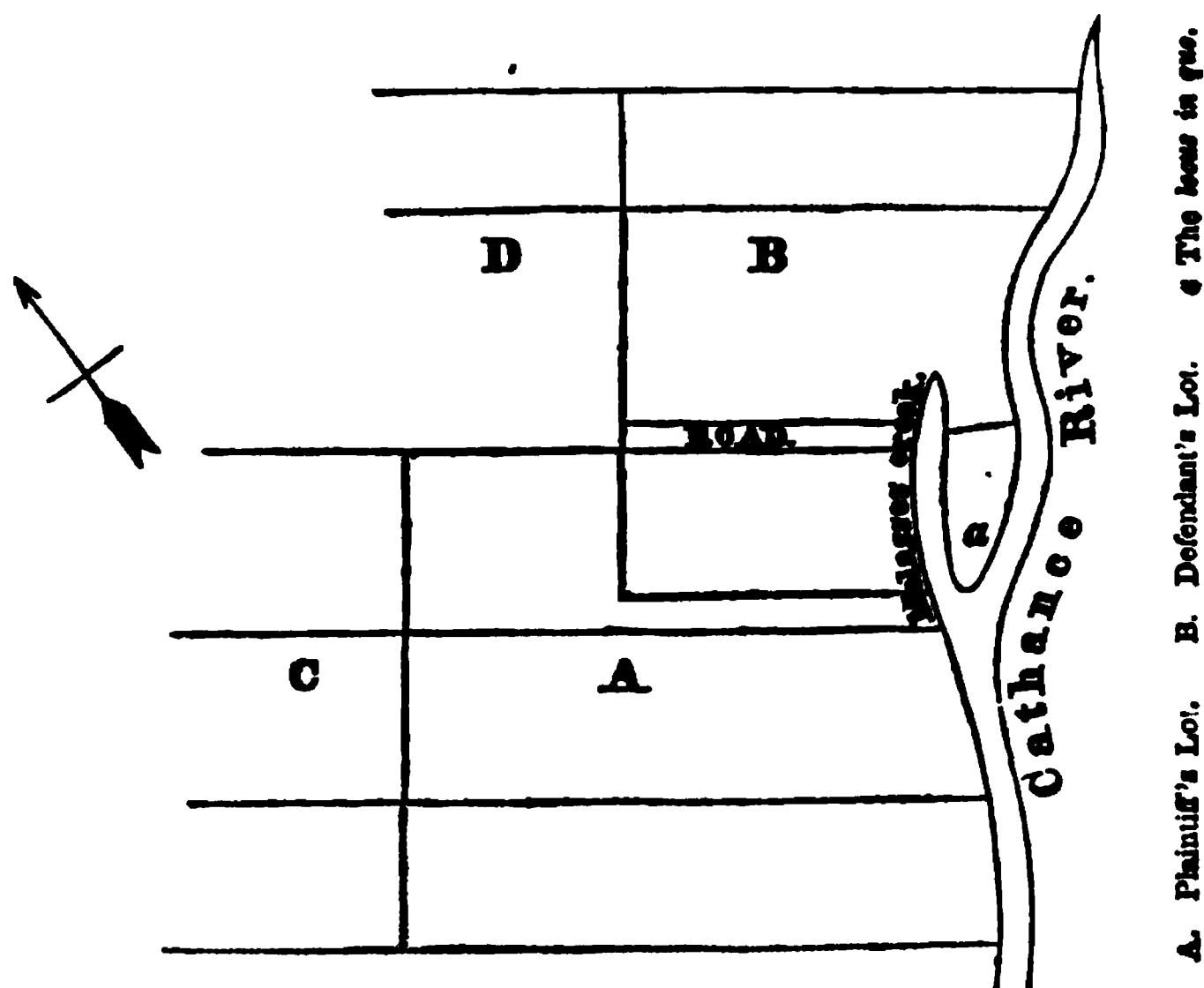
§ 20. A patent in North Carolina described the land as lying on the north side of a river, and the line in dispute called for "a pine on the marsh branch, then along the said branch 320 poles, thence to the beginning," and the branch meets the river at a shorter distance. It was held that the branch was the boundary, and the mouth the corner of the land covered by the patent, and that the distance was to be disregarded.²

§ 21. It has been held in Maine that if a tract of land is granted, fronting on and bounded by a river, the side lines are to be continued to the main stream, though they thereby cross a point formed by the junction of one of its branches with the principal river. Trespass was brought for entry upon land, which was the point of land made by the junction of a creek, called "Molasses Creek," with a river, called "Cathance" river, in Maine: and the plaintiff claimed the land in question as a part of a lot called "letter A." The question was at first, by rule of Court, referred to arbitrators; and upon the coming in of their report, which was in favor of the plaintiff, it was contested by

¹ Nourse v. Lloyd, 1 Barr, (Penn.) R. 220.

² Carraway v. Witherington, N. Carolina Term R. 275; 1 Ired. (N. C.) Dig. 107.

the defendant, and on his motion recommitted. After a second hearing, a report was again returned for the plaintiff and again contested by the defendant. It appeared from examination of the referees, that the principal controversy was whether the *locus in quo* was part of the lot called A, belonging to the plaintiff, or of B, belonging to the defendant. These lots in point of fact, upon actual survey, were situated as thus described by the continued lines :



It appeared further before the referees, that a plan of these lots, with others, was made by John Merrill, in 1772; the part representing these lots purporting to be copied from McKenzie's plan, by which the lots were represented as lying farther down the river, and the road between the two lots as touching the river below the *locus in quo*, as appears by the dotted lines in the above diagram. The plaintiff hereupon contended that the lot A extended across the creek to

Cathance river, on which it was bounded by the deed ; and further proved, that in low tides the water wholly flowed out of the creek at low water, in the part contiguous to his lot. But the defendants insisted that no more land would pass by the grant of lot A than was delineated on the plan ; by which the flats in question were evidently a part of lot B. But the referees, intending, as they said, to decide according to law as well as equity, were of opinion that as the side lines of the lots and of the road, as far as the creek, were undisputed and unquestionable, the division line must be taken to extend by the same course to the river, the creek not being mentioned as a boundary in the deed, and thereupon decided for the plaintiff. The exceptions to the report were overruled by the Court ; WESTON, J., who delivered their opinion, observing : — “ There being no question about the side lines of the lots A or B, the flats in controversy belong to the plaintiff, as the owner of A, if that lot extends to the river. The title of both the parties to their respective lots, is derived from a conveyance by James Bowdoin of lot A to Abraham Preble, Jr., and of lot B to Abraham Preble. By that conveyance, lot A is bounded easterly on Cathance river. Lot A then very clearly embraced these flats. It is contended, however, that this plain and necessary result is to be controlled and modified by a certain plan, made by John Merrill, in 1772, upon which these lots were delineated. No plan is referred to or mentioned in Bowdoin’s deed ; but it is urged, that the designation of the lots by letters implies and supposes a plan. This does not necessarily follow. A survey might be made, and the lots now owned by the parties, and the rear lots upon which they were

bounded, might receive the names of A B C and D, without making a plan. And if a plan was made, and A did not, as laid down upon it, go to the river; if the owner did not refer to the plan, and thought proper distinctly and expressly to extend it to the river, in his conveyance, he had a perfect right so to do; and the grantee would hold accordingly. But if the plan exhibited to the referees and now produced to the Court had been referred to, the limits of A would not thereby be curtailed. By that plan, the whole easterly line of A is bounded on Cathance river. It is true, Molasses Creek is there represented as entering upon the south side of B and extending northerly thereon; whereas, in fact, it enters upon A. But this mistake in the location of the creek does not change the rights of the parties. The creek is not given as a boundary in the deed, but each lot is expressly bounded on the river, both in the deed and on the plan. When the survey was made, the waters of the river might have been so high that the mouth of the creek might appear to the eye to be on B, and this may account for its having been thus delineated; but, however occasioned, this error in a part of the plan, altogether immaterial in fixing the location of the lots, can have no legal influence in the decision of the cause.”¹

§ 22. In North Carolina it is a principle clearly settled, that a natural and permanent object shall be deemed the boundary in preference to the line designated by course and distance. It is true that the call for a natural boundary may be, itself, vague or imperfect, or even contradictory; as in the case of a stream

¹ *Graves v. Fisher*, 5 Greenl. (Me.) R. 69.

of water where there are two of the same name; or, if it be uncertain which of the two bears the name, then, necessarily, the case is open for evidence to the jury, as to which was the object meant, and by which the survey was actually made.¹ In *Hurley v. Morgan*, in North Carolina,² it was held, that, as a general rule, in questions of boundary, a natural object has a preference over marked lines or corners, and will control them when the natural object is of such a nature as cannot easily be mistaken by the parties either in name or situation, as in the case of a *river*. But the reason of this rule does not apply to very *small streams* which either have no names, or have formerly had a different name from that which they now bear. With respect to these, it is open to evidence *which stream* the parties meant by a particular name; and the jury, if satisfied of the fact, from proof of possession or the like, may find a stream to be the one meant, although not the one bearing the name mentioned in the deed.

§ 23. It appears to be generally understood, that, where general terms are used in a description in a deed, the Court will put a construction upon those terms where any definite rule has been established. Thus, premises conveyed and described as being bounded by a watercourse, extend by legal operation to the thread of the river; yet in this case the grant *may* be limited by language sufficiently strong and definite to give a different operation and exclude the watercourse; for, where parties make any definite agreement in their deed, such agreement will control

¹ *Becton v. Chestnut*, 4 Dev. & Bat. (N. C.) R. 335.

² *Hurley v. Morgan*, 1 Dev. & Bat. (N. C.) R. 425; and see *Lynch v. Allen*, 4 Dev. & Batt. (N. C.) R. 62.

any legal implication.¹ The cases, on the whole, may be said to demonstrate the existence of the rule, that a grantee bounded on a river, (and it is almost immaterial by what mode of expression,) goes *ad medium filum aquæ*, unless there be decided language showing a *manifest intent* to stop at the water's edge;² and there seems a distinct and strong tendency in the cases to turn every doubt upon expressions which fix the boundary next the river, in favor of a contact with the water. The words which create the most difficulties are where the *termini* of the river line stand on the bank at some distance from the stream, and the line is prescribed to run between them "along the river," or "up the river," or "down the river," or the like.³ The description of "margin" of a river was used in a grant of land made by the State of New York; and it was contended that the State, by such description, had *reserved* the bed of the river, and of course the right to the river itself. The Court, however, decided, that such a construction was a misapprehension of the legal meaning and extent of the grant; and they held, that though land, nominally and in terms, is bounded on the "margin" of a river, it extends,

¹ *Waterman v. Johnson*, 5 Pick. (Mass.) R. 423; *Hammond v. Ridgely*, 5 H. & Johns. (Md.) R. 215. The owner of land on each side of a road or stream of water not navigable, is *primâ facie* presumed to own to the centre; and in the construction of deeds, the general rule is, that when a grant of land is bounded on a highway, it conveys the land to the centre of the road, *unless there be decided and controlling words or specific descriptions to show a contrary intent*. *Herring v. Fisher*, 1 Sand. Sup. Co. (N. Y.) R. 344; *Hammond v. McLachan*, *Ib.* 323.

² 3 Kent's Comm. 429.

³ The opinion of Cowen, J., in *Starr v. Child*, 20 Wend. (N. Y.) R. 149.

by construction of law, to the centre or thread of the river.¹

§ 24. The word "bank" of the river, may be used as synonymous with the river, carrying the boundary line *to* the bank, and then along the river, and not along the "bank of the river."² The Supreme Court of Massachusetts, say that, without doubt, the owner of land extending to the "bank" of a river, will own to the middle of the river; but that the owner "may sell the land without the privilege of the stream, as he will if he *bounds his grant by the bank.*"³ The Court, it appears, admit that an owner to the "bank" of the river owns the river; but they immediately say that he *may* bound his grant by the "bank," and the stream will not pass. This has been considered as evidently meaning a bounding by a reservation, or plain exclusion; or, otherwise, the expression would be inconsistent in itself and incompatible with principle and all the cases; and that it is plain that the naked circumstance of bounding a grant *on, to, or by* a "bank," cannot exclude the stream any more than bounding on the "margin" of the stream.⁴ The remark of the Court in the case in Massachusetts, that where land is bound-

¹ Jennings, *ex parte*, 6 Cow. (N. Y.) R. 518.

² Per Gridley, V. Chan., in Varrick v. Smith, 9 Paige (N. Y.) Ch. R. 547; Lamb v. Rickets, 11 Ohio R. 311.

³ Hatch v. Dwight, 17 Mass. R. 289.

⁴ See the note of the Reporter to the case of Jennings, *ex parte*, 6 Cow. (N. Y.) R. 549, and *ubi sup.* In this case of Hatch v. Dwight, E, in 1807, mortgaged a strip of land including mills, and running a considerable distance along the river; but, in 1810, having sold a small piece of the mortgaged premises for a hide mill and lime vats, he obtained a grant, or rather *release* from the mortgage, for a nominal consideration of what he (E) had sold, described thus: beginning at the *end of a dam*; running up the river two rods and so round *to the bank of the river*. The mortgagee afterwards having foreclosed, one question was whether the release gave a

ed by the "bank" of a stream, such description excludes the bed of the stream, it was held by the Vice-Chancellor of New York, (GRIDLEY,) to be clearly founded in truth, *as applied to the facts of that case*;¹ and the facts of the case, he held, to be such as to indicate, with great certainty, that, by the use of the phraseology employed, the parties intended to exclude from the operation of the release the bed of the stream. But he was at the same time of opinion that this was not the necessary construction of such descriptive words in a grant. The popular understanding of them, he considered, would doubtless limit the grant of the land adjacent to the stream; and so would the popular understanding of a description which bounded the premises upon the "margin" of a stream, or on the stream itself; but the legal construction of such words contained in the description of premises in a grant, had, by repeated adjudications, been established otherwise.²

right to the centre of the river; and it appeared that if it was to have this effect, it would destroy the value of the mortgagee's mill privileges. For this and other reasons, it was held that it should not extend beyond the bank. The various reasons assigned by the Court, were, that the release was limited to the bank; that there were no general words showing that a right to keep up a dam, was intended to pass; that the consideration was nominal; and that it was not to be inferred that the mortgagee intended to release every thing valuable in the mortgaged premises, for which he had given a large consideration. The Court considered the release, under these circumstances, as being no more than a mere *exception* to the mortgage; and there were various other special circumstances in the case which led the Court to infer that the *intention* of the parties was to limit the grant or release to the bank. See the note of the Reporter to Jennings, *ex parte*, 6 Cow. (N. Y.) R. 636, *et seq.*

¹ Which are stated in the preceding note.

² Varick v. Smith, 9 Paige (N. Y.) Ch. R. 547. A line called for "171 poles to Roanoke River," the call to the river terminates, when the line reaches the "margin" or "bank" of the river, without regard to distance; and the intersection of the lines with the river is the point from which the next line commences. Haughton v. Rascoe, 3 Hawks. (N. C.) R. 21.

§ 25. In an important case in Ohio it appeared that the plaintiff had taken possession of the *bed* of the river Sandusky, and had built a mill; and he sued the defendants for building below and flowing back water upon the mill. The defendants denied that the plaintiffs owned the bed of the stream; for they claimed under a conveyance from the United States, bounding them on the "bank;" and, indeed, the area of the river was deducted by the United States, and only lands on the shores paid for. Yet the bed of the stream was held to pass, though there was every thing but an express exception by the United States. They had included the river in their surveys, but deducted the bed from the price, and bounded the patentee on the banks. The Court ask, "At what point does the right of the owner of the adjoining lands terminate? on the top or at the bottom of the bank? at high or low water mark? does his boundary recede or advance with the water, or is it stationary at some point? and where is that point?" The Court then say, "No satisfactory rules can be laid down in answer to these questions, if the Common-Law doctrines be departed from."¹

§ 26. It thus appears to be well established that the *bank* and the *water* are correlative, and that one cannot be owned without touching the other; that the *bank* is the principal object; so that when the law once fixes the proprietorship of *that*, the soil of the river follows as an incident; or rather, (as it has been said,) "as part of the subject-matter, *usque ad filum aquæ*."² If a boundary is described as running to a monument standing on the

¹ Gavit's Adm'rs v. Chambers, 8 Ohio R. 495.

² By Cowen, J., in Starr v. Child, 20 Wend. (N. Y.) R. 149.

bank, and from thence running "by the river" or "along the river," it does not restrict the grant to the bank of the stream; for the monument in such case is only referred to as giving the directions of the line *to the river*, and not as restricting the boundary *on the river*. If, however, the grantor, after giving the line to the river, restricts his land to the *bank* of the river, or describes the line as running *along the bank* of the river, his intention is manifested not to consider the whole *alveus* of the stream a mere mathematical line, so as to carry his grant to the middle of the river.¹

§ 26, *a*. There is obviously an essential difference between "fronting *to*," and "fronting *upon*," and it has thus been illustrated by Mr. Livingston, counsel for the defendants in *Morgan v. Livingston*, in Louisiana.² "The cathedral (New Orleans) fronts the public square and the river; but it fronts upon Chartres street. The expression, then, *front* or *front to*, only means the exposure, the direction of that boundary of a house or lot, in which is the principal entrance. How many houses, lots, and farms, on the heights about New York and Naples, front those bays, which are yet miles distant from the water?"

§ 27. In a conveyance of a lot of land situate in Rochester, in the State of New York, the lot was described as a "mill lot," "beginning &c., and running eastwardly to the Genesee River; thence northwardly

¹ Per Walworth, Chan., in *Child v. Starr*, 4 Hill (N. Y.) R. 369; *Lamb v. Ricketts*, 11 Ohio R. 311. In Tennessee, where the grant called for a "tree" and the "river bank," thence *down the river* to another "tree" on the "bank of the river;" it was held, that the meanders of the river must be the boundary, and not a straight line. *Weakley's Lessee v. Legrand*, 1 Tenn. R. 269.

² *Morgan v. Livingston*, 6 Mart. (Louis.) R. 19.

along the *shore* of said river to Buffalo Street." It was held, by the Supreme Court of that State, that the grantee took *usque ad filum aquæ*.¹ But BRONSON, J., dissented; and on appeal to a Court of Errors the decision was reversed. By that Court it was held that no part of the bed of the river passed under the conveyance, and that the grantee took only to low water mark. And the fact, that the premises conveyed in this case were described in the deeds as "mill lots," could not operate to extend the grant into the *alveus* or bed of the river, for the deeds also showed, that *the contemplated mills were to be supplied with water from the mill-race already constructed*; and not by water to be taken from the Genesee River opposite the lots granted; and the right to discharge the water into the river after it had been used to propel the machinery on the mill lot, was at most but an easement, and did not require for its ownership any part of the bed of the stream by the grantees. It was moreover considered that a river in which the tide does not ebb and flow, has, properly speaking, no *shore*; that it has *ripam*, but not *littus*; ² that when the term *shore* is applied to such a river, it means the river's banks above the low water mark, rather than those portions of the banks of the river which touch the margin or edges of the water; so that a grant of land which is bounded by the *shore* of a freshwater river, conveys only the land to the water's edge, at low water.³

¹ *Starr v. Child*, 20 Wend. (N. Y.) R. 149.

² See Hall on Rights to the Sea; and Angell on Tide Waters.

³ *Child v. Starr*, 4 Hill (N. Y.) R. 369. In the case in the Supreme Court, (*Starr v. Child*, *ubi sup.*) Cowen, J., in giving the opinion of the Court, thus criticizes the word *shore*: "I admit that it is not critically

§ 28. Where a line is described as running in a certain direction to a river, thence "up the same," or "down the same," or "with the river," those words necessarily imply that the line is to follow the river, according to its meanderings or turnings; and that of course must be the middle of the river.¹

§ 29. Where land adjoining a river is described as bounded by a *monument* standing on the bank of the river, and a course is given as running from it down the river as it turns, to another monument, the grantee takes to the middle of the river.² So where land is bounded by a line commencing at a *stake* "by the side of the river or mill pond," and running "by the side

correct to say the *shore* of a river; the term belongs, in its strict sense, to the ocean. Dr. Johnson says it applies to a river only in a secondary, or, as he calls it, a *licentious* sense. 'Beside the fruitful *shore* of muddy Nile.' Johns. Dic. 4to. *Shore*. Yet it is sometimes so applied in legal proceedings. The compact between Virginia and Kentucky speaks of the *shores* of the Ohio; which word *shores* was treated by C. J. Marshall as the same with *side* or *bank*. Handy's Lessee v. Anthony, 5 Wheat. (U. S.) R. 385." "It is conceded," says the learned Judge, "that the words *to and along the river* would include the stream. What difference between that and *to and along the shore*? A difference in words signifying the same thing. In either case, taken literally or according to common understanding, they carry you to a line immediate the water and the land, and touching both. How do they take more? Upon construction of law, which does not require express words for the grant of every part, as houses, fences, mines, or the elements of water or air, which all pass by the word *land*; and as a grant of land by certain boundaries, *primâ facie* passes all such parts to the grantee, *usque ad cælum et ad infernos*; so, within the same principle, it passes the adjoining freshwater stream, *usque ad filum aquæ*."

¹ Jackson v. Snow, 12 Johns. (N. Y.) R. 252; Johnson v. Pannel, 2 Wheat. (U. S.) R. 206. A call in a grant from a bound on a river, "*west up the river to a stake*," is in law equivalent to "*with the river*," and the line must pursue the course of the stream. Denn v. Mabe, 4 Dev. (N. C.) R. 180. "Thence 50° east, down the creek," the creek is the boundary. Smith v. Auldrige, 2 Hay. (N. C.) R. 382.

² Luce v. Carley, 24 Wend. (N. Y.) R. 451.

of said pond" to another *stake* "by the side of said pond," the grant extends to the thread of the river.¹ The decision in *Lunt v. Holland*, in Massachusetts,² is, that a line running between two trees, one standing "by the side of," and the other "by the river," is a bounding on the river; and that the grantee is, therefore, a riparian proprietor, and his land extends *usque ad filum aquæ*. The land around a tract of land was described in a deed as "running to a stake at the river, thence on the river north 6° 40' west, 23 perches; thence north 39° 50' west, 33 perches; thence north 20° 20' west, 35 perches and 3 links, to a stake by the river." This description, it was held, made the river the boundary.³

¹ *Lowell v. Robinson*, 4 Shep. (Me.) R. 357. Running to a *stake* on the Ohio river, held to be a boundary on the river. 1 Pirt. (Ken.) Dig. 130.

² *Lunt v. Holland*, 14 Mass. R. 149.

³ *Rix v. Johnson*, 5 N. Hamp. R. 520. RICHARDSON, C. J., in this case said: "We were at first inclined to think that the return had not made the river a boundary. For, although the stakes are described as *at* and *by* the river, and the line is said to run on the river, yet, taking the whole return together, we thought it not improbable that the words *at*, *by*, and *near* the river, might be intended to express nothing more than 'near the river.' And the circumstance that the line along the river is so particularly described by courses and distances, seemed to us to countenance such a construction of the return.

"But there are circumstances and arguments, which upon a more attentive consideration of the case seem to us much more decisive, to show that the river must have been intended as a boundary.

"In the first place there are no monuments mentioned in the return, at the river, except in the lines that run to and from the river. In the description of the lines along the river, although the course changes twice, no bound is mentioned. If the intention was to make the river the boundary, this is all natural. But if the intention was to have the line upon the bank, it would have been according to the usual practice to have mentioned a monument at each change of the course.

"In stating the course of the line along the river from the 'stake at the

§ 30. It is considered to be settled in North Carolina, that "up the river" is the same as "along the river," unless there be something else besides course and distance to control it. Thus, a call in a grant from a river "*west up* the river to a *stake*," was held in law to be equivalent to "*with* the river," and the line must pursue the course of the stream; but this sense of the words might *possibly* be controlled by a call for a line of marked trees, or a visible permanent corner, and a meaning thereby given them equivalent to "*up*," not "*with* the river;" but by no call less certain can they be controlled.¹ The last line given in a deed of land in North Carolina, was thence "along the river to the beginning," and the river was held to be the boundary, although the line coming towards the river called for a *white oak* as its termination, which was half a mile distant from the river.² In another case in the same State, the lines called for were "east 177 poles to an oak, thence southwardly

river,' it is expressly said to be 'on the river;' and although the words 'on the river' are not repeated at each change of the course of the line, yet, as the line ends at a stake by the river, and, in fact, nearly coincides through the whole extent with the ridge of the bank, the words '*on the river*' may perhaps be fairly enough considered as intended to apply to the line in its whole extent. If this be so, it is a strong argument to show that the river was intended as a boundary. And this argument is greatly strengthened by the consideration, that, if the river had not been intended as the boundary, it would have been natural to use the words '*on the bank*,' instead of '*on the river*,' in this place, which would have removed all doubt. If the line had been stated as running to a stake at the river, thence on the bank of the river, the courses and distances mentioned in the return, there would have been no pretence for saying that the river was a boundary. 4 Mason, 365, 366; 17 Mass. R. 298."

¹ Rogers v. Mabe, 4 Dev. (N. C.) R. 180; and see Slade v. Neal, 2 Dev. (N. C.) R. 61; and Ante, § 22.

² Sundifer v. Foster, 1 Hay. (N. C.) R. 237.

along the various courses of the river." There was a marked oak at the end of the distance; and the river, from whence the point where a direct line from the oak would intersect it, ran southwardly. The east or third line called for, it was contended, extended to the river, because the river was the boundary called for between the corner of the third line and the beginning. This, as an abstract proposition, the Court said, was true, but then there was evidence that an oak actually stood at the spot where the 177 poles end; and a southwardly course from thence would strike the river at a small distance, and the river from the point where it is intersected by a line from the oak to the nearest part of the river runs southwardly to the beginning. If, said the Court, the line be not stopped at the oak, but is extended to the river, the course of the river from thence would not be in a southwardly but in a westwardly course till we got opposite the oak, and then southwardly. It was left to the jury with the instruction that if they believed the oak to have been made the point of termination when the *original survey* was made, they should make it now the boundary.¹

§ 31. A grant of land in Maryland described the land as lying on the west side of N. branch of P. river, beginning at a bounded oak standing by the said branch, and running, &c., &c., to a bounded white oak standing by the said river, then bounding on the said river running S. 50 E. 270 perches, then by a straight line to the first bounded tree. It was held to be uncertain whether the last line bounded on and

¹ Conder v. Coor, 2 Hay. (N. C.) R. 183.

followed the meanders of the river, or whether it run in a straight line to the boundary ; and that the question was to be decided by the jury.¹ But where in a grant of a tract of land, it is described as “lying on the west side of the N. branch of Patuxent river, beginning at a bounded red oak, standing by the said river and running (three courses) to a bounded white oak, standing by the said river and then bounding on the said river, running S. 50 E. 270 perches, then by a straight line to the first bounded tree ; it was held, that the construction of that grant was for the Court, and that the imperative construction was, that the fifth or last line could only be located by beginning at the end of the fourth line, wherever that was, and running a straight course to the beginning, without regard to the meanders of the Patuxent river.² In *Hammond v. Ridgely*, in Maryland,³ it was held, that where a grant of a tract of land is described as “beginning at three bounded white oaks standing by Patuxent river, and *running* and *bounding* on the said river N. 4 E. 87 perches ; then N. (sundry courses) ; then N. 1 W. 48 perches, to a bound white oak, by the river ; then S. 47 E. 388 perches, to a bound white oak ; then by a straight line to the first mentioned white oaks ; the first course is to be run N. 4 E. 87 perches, bounding the same on the river Patuxent, and all the subsequent courses were to be run according to the course and distance, until the course N. 1 W. 48 perches.

§ 32. When a grant of land refers to a *map*, upon which the land is laid down as bounded on a water-course, the grantee is entitled to hold *usque ad filum*

¹ *Corsey v. Hammond*, 1 H. & Johns. (Md.) R. 190.

² *Hammond v. Ridgely*, 5 H. & Johns. (Md.) R. 245.

³ *Ib.* 215.

aquæ.¹ In a sale of land in the village of Oswego, in the State of New York, (by virtue of which the grantee claimed the use of the water to the thread of the river,) the lots were not very particularly described in the certificate of sale; but a map of the village in the office of the Secretary of State was referred to, and the lots were sold as laid down on that map. In a bill in Chancery by the grantee for a diversion of the water by canal commissioners, it was stated that the map designated the lots as being mill and water lots; and that the surveyor-general, at the sale, represented the lots as such, and that the purchaser would have the right to use them as such. The construction given by the Court was, that the grant of the lots under the above description and circumstances, included a right to the watercourse.²

§ 33. In Kentucky, the *plat* of public lands is, by law, a necessary part of the surveyor's report, and it is, therefore, proper evidence in ascertaining the position of the land, and what it includes. It has often happened in that State, that surveyors have one or more lines, bounded by streams of water, calling for divers courses, as meanders thereof, and the plat itself exhibits the stream as composing such lines; but whenever there is an attempt to run their courses and distances contained in a certificate and patent, they will not follow the stream at all, but widely depart from it; and, in such cases, it is held, that the stream must control the courses and distances called for, because *the plat makes the stream the boundary*.³

¹ *Newson v. Pryor*, 7 Wheat. (U. S.) R. 7.

² *Varick v. Smith, Paige*, 5 (N. Y.) Ch. R. 137; *Ib.* 547.

³ *Reid v. Langford*, 3 J. J. Marsh. (Ken.) R. 420.

§ 34. Where a verdict in an action of ejectment called to run from one fixed object to another, with the meanders of the stream, *not located upon the plats*; it was considered by the Court so entirely uncertain, whether it was within the lines of the tract claimed and defended or not, that no judgment could be entered upon it, nor writ of possession executed under it.¹

§ 35. In a case decided by the Supreme Court of Maine, it appeared that a lot of land, being one of several fronting on the river, was sold by reference to a plan, without other description; and it also appeared that the surveyor, in laying out a large number of river lots, measured the front lines and marked the corners of the river, but never surveyed the sides nor the rear lines; nor did he correctly lay down the course of the river, but represented the place in question as a regular curve, and laid down the rear lines of the lots from corner to corner, as part of a larger concentric circle, when in fact the course of the river at that place was irregularly serpentine. It was held that the lots were to be located by laying off the side lines by the courses and distances from the river, according to the plan, and then drawing the rear lines from one corner to another, thus making them conform to the true course of the river, as originally designed, though not so delineated by the surveyor.²

§ 36. Whenever the beginning of a tract of land is ascertained, and the lines from thence are to terminate .

¹ *Miles v. Knott*, 12 G. & Johns. (Md.) R. 442.

² *Loring v. Norton*, 8 Greenl. (Me.) R. 61. The Court cited as authority, *Bowman v. White*, decided in Maine in 1801; and *Proprietors of Ken. Purchase v. Tiffany*, 1 Greenl. (Me.) R. 210.

at a watercourse, if the course and distance given will not extend the line to the watercourse, the course and distance must be disregarded; and the line, notwithstanding these, must be extended to the watercourse, that being a natural boundary.¹ Where a line was described as running S. W. by S., to the head of "Howard's Branch," it was held that it must run in a straight line from its beginning to that boundary.²

§ 37. In *Harramond v. McGlaughan*, in North Carolina,³ it appeared that about fifty years before the year 1798, the State had granted to the defendant a tract of land beginning at a hickory, standing *not far* from a river, and running thence *down the river* a certain course and distance; but the course run *obliquely* from the river, leaving between it and the river a triangular piece of land. The State claimed this triangle, and, in 1787, granted it to the plaintiff, who sued in ejectment. The Court held that the river was the boundary of the first grant, and decided against the claim of the State; and they used the following language: "When a deed, patent, or grant describes a boundary from a certain point *down a river*, mentioning also courses and distances, should the latter be found not to agree with the course of the river, it ought to be disregarded, and the river considered the true boundary."

§ 38. One of the lines in a deed of conveyance was thus described: "Beginning at the mouth of Black Brook, on the south side of the brook, and running from thence up said brook, due west, until it strikes

¹ *Pollock v. Harris*, 1 Hay, (N. C.) R. 252; and see cases referred to in 1 Ire. (N. C.) Dig. 107; and Ante, § 22.

² *Howard v. Moale*, 2 H. & Johns. (Md.) R. 249.

³ *Harramond v. McGlaughan*, Taylor, (N. C.) R. 196.

the common land." The brook was very crooked, running sometimes on one side and sometimes on the other side of a due west line. It was held that the brook was not designated as a monument with sufficient certainty to control the point of compass.¹

§ 39. A grant of land extending to a certain distance on each side of a river, (and no courses are given,) is to be located in such a manner that every point in the exterior line shall be exactly that distance from the *nearest* point of the river. The words of the grant in *Winthrop v. Curtis*, in Maine,² were "the space of fifteen miles on each side of the Kennebec river, and it was held by the Court that the location of the land was to be made in the mode just mentioned. The same is the established rule in New York, and prevailed in the Court of Errors in that State, in the location of the Catskill patent, which was to extend four English miles "from five great plains." That Court held the true construction of the patent to be, that its boundaries were to be ascertained by lines four miles distant, in every direction from the five plains mentioned in the patent, so as to make the exterior lines correspond as far as possible with the sinuosities of the plains.³ The location of the Hoosack patent, which extended for two miles on each side of the river by that name, was the subject of controversy in the same Court; and DE WITT CLINTON, Senator, in delivering his opinion, in which a majority of the Court concurred, states, that "the mode now adopted by the State, and considered the only practicable one in cases

¹ *Bowman v. Farmer*, 8 N. Hamp. R. 402.

² *Winthrop v. Curtis*, 3 Greenl. (Me.) R. 110.

³ *Van Gorden v. Jackson*, 5 Johns. (N. Y.) R. 440.

like the present, is to run the bounds, so that every point in them shall be exactly the given distance from the point nearest to it in the creek or river.”¹ In the case of *Jackson v. Lunt*, in New York,² Staat’s patent was under consideration. This patent was to run up the river Hudson as that river runs, from a certain point, two hundred chains; thence up into the woods, north-west twenty chains, to the mountain; thence along said mountain, parallel with the Hudson river, to a certain rivulet; thence down that rivulet to the place of beginning. SPENCER, J., in delivering the opinion of the Court, observed, that in running a line parallel with a river, it is only requisite that the distance, where that is to control, should be such that the river in some one point is not further off than is required. In other words, the west line of Staat’s patent, without reference to the mountain, if run parallel with the general course of the river, might in some places be at a greater distance than twenty chains, and yet be correctly run. But if *particular courses* are given in a grant of a tract of land bounding on a river, to the exterior side lines, the location must be determined accordingly. Thus, where a tract of land was granted *fronting on a brook*, and extending back *by a given course*, two miles; it was held, that by this description each side line should be two miles in length, and that the rear line must be parallel with the front.³

§ 40. An entry of Virginia military lands, in Ohio, read as follows: “Churchill Jones enters 1,000 acres of land, part of a military warrant, 2,311, on the north-

¹ *Williams v. Jackson*, 5 Johns. (N. Y.) R. 489.

² *Jackson v. Lunt*, 2 Caines, (N. Y.) R. 363.

³ *Keith v. Reynolds*, 3 Greenl. (Me.) R. 393.

west side of the Ohio, beginning at the mouth of Brush or Eighteen Mile Creek, running up the river 50 poles, thence from the beginning down the river 500 poles when reduced to a straight line, thence at right angles from the general course of the river, for quantity." The true construction of this entry, it was held, was to give a base on the Ohio river of 500 poles, including the 50 poles above the creek.¹ Another entry of the same kind called for 1,000 acres on the lower side of Brush Creek, "beginning at a marked cherry-tree, supposed about ten miles above Tod's Road, running thence west 400 poles, and from each end of this line for quantity." The distance was understood to be in a direct line, and not by the meanders of the creek, it being a small stream, and the usual line of travel not upon its banks.²

5. *Difference between a Boundary on a Watercourse, and a Boundary on a Lake or Pond.*

§ 41. When land is conveyed bounding upon a *lake* or *pond*, if it is a *natural* pond, the grant extends only to the water's edge; but if it is an *artificial* pond, like a mill pond, caused by the flowing back of the water of a river, the grant extends to the middle of the stream, in its natural state.³ In *Bradley v. Rice*, in Maine,⁴ it was contended, that a certain lot which was conveyed bounding on a natural pond raised by artificial means, was not limited by the margin of the

¹ *Hastings v. Stevenson*, 2 Ohio R. 8.

² *Buckley v. Gilmore*, 12 Ohio R. 63.

³ *State v. Gilmanton*, 9 N. Hamp. R. 461; *Hathorn v. Stinson*, 1 Fairf. (Me.) R. 238; see also *Smith v. Miller*, 25 Mason, (Cir. Co.) R. 196.

⁴ *Bradley v. Rice*, 1 Shep. (Me.) R. 198.

pond, and that, by construction of law, it extended to the centre. But the Court held otherwise, and made a distinction between such a pond and a stream of water. No case, they observed, had been cited, nor had any been found by them, where the rule of construction had been extended to a natural pond; and they then proceeded to say — “The proprietors of the pond and of the contiguous land, when they sold to the pond, must have intended to reserve that as a reservoir for the purpose to which it had been appropriated.” And they add, — “Had the land been bounded by a river or stream, or upon an artificial pond created by expanding a stream, by means of a dam, the riparian proprietor would go to the thread of the stream.” But this, though they conceived it to be law well settled and understood, did not, in their opinion, apply generally to ponds and lakes. They cite the similar case of *Waterman v. Johnson*, in Massachusetts,¹ as being one strictly in point. In that case the land conveyed was a farm, the bounds of which were described in the deed as beginning at “Jones’s River Pond,” and, after several courses, running to the “Ferse Pond,” thence up stream by said pond to the canal that leads from “Jones’ River Pond,” thence by said canal to “Jones’ River Pond,” thence by said pond to the first mentioned bound. It was in evidence that “Jones’s River Pond” was a natural pond, and that ever since the memory of man, it had at times been flowed beyond its natural dimensions, by artificial means. Parol evidence was held to be competent to prove, that a certain line was

¹ *Waterman v. Johnson*, 13 Pick. (Mass.) R. 261.

agreed on and understood at the time of the conveyance, as the boundary. SHAW, C. J., in giving the opinion of the Court, said,—"Now the word 'pond' is indefinite. It may mean a natural pond, or an artificial pond raised for mill purposes, either permanent or temporary, and in both cases the limits of such body of water may vary at different times and seasons, by use, or by natural causes, and where the one or the other is adopted as a descriptive limit or boundary, a different rule of construction may apply. A large natural pond may have a definite low-water line, and then it would seem to be the most natural construction, and one which would be most likely to carry into effect the intent of the parties, to hold, that land bounded upon such a pond would extend to low-water line, it being presumed that it is intended to give to the grantee the benefit of the water, whatever it may be, which he could not have upon any other construction. Where an artificial pond is raised by a dam, swelling a stream over its banks, it would be natural to presume, that a grant of land bounding upon such a pond, would extend to the thread of the stream upon which it is raised, unless the pond had been so long kept up as to become permanent, and to have acquired another well-defined boundary. But it is difficult to apply either of these rules to the present case, which is that of a pond originally natural, but which has been raised more or less by artificial means. The discovery of this fact, upon applying the deed to the local objects embraced within its descriptive terms, discloses a latent ambiguity. According to a well-established rule of evidence, therefore, it is competent to resort to parol proof, showing all the circumstances, from which a legal inference can be drawn, that one or another

line was intended by the ambiguous description used in the deed. And this is, in truth, what both parties have done in the present case."

§ 42. The law of boundary, as applied to rivers, is without doubt inapplicable to the *lakes* and other large natural collections of freshwater in this country.¹ The ordinary Common-Law rule of extending the right of soil in running freshwater streams, to riparian grantees, Chancellor Walworth considered was not sufficiently broad to embrace the large freshwater lakes, or "inland seas," in the State of New York; and that they were wholly unprovided for by the Common Law of England. As to these, said he, there is neither flow of the tide nor thread of the river; and it appeared that the local law of the State had assigned the shores down to the ordinary low-water mark to the riparian owners, and the beds of the lakes with the islands therein, to the public.² Such is the judicial construction in New Hampshire; and it seems to have been the construction of the legislature of that State, as appears from the annexation of islands in Winnipiseogee Lake, to the towns adjacent.³ If a town in that State, strikes any large body of water, by whatever name it may be called, it will go only to the water's edge, and be there bounded; that is, if there is nothing in the terms of the grant to show that it was to be extended further.⁴

§ 43. If a lot of land is conveyed agreeably to a plan, and is described as bounding one end on a pond, and there is a narrow arm of the pond extending from

¹ *State v. Gilmanton, ubi sup.*; *Hathorn v. Stinson, ubi sup.*

² *Canal Commissioners v. People*, 5 Wend. (N. Y.) R. 423.

³ *State v. Gilmanton*, 9 N. Hamp. R. 461.

⁴ *Ibid.*

the pond across the lot, and if the land conveyed is to be limited by this arm, the lines will not correspond with those of the adjoining lots, and there would remain a portion of land not conveyed between the arm and the pond ; the land granted extends across the arm to the main body of water called the pond.¹

¹ *Nelson v. Butterfield*, 8 Shep. (Me.) R. 220.

CHAPTER II.

OF INSULAR AND ALLUVIAL RIGHTS, AND OF RIGHT TO SOIL
RELICTED, &c., AS INCIDENT TO THE RIGHT OF PROPERTY
IN A WATERCOURSE.

1. Islands.
2. Alluvion.

3. Reliction.
4. Avulsion.

1. *Islands.*

§ 44. In treating, in the preceding chapter, of the apportionment of a watercourse between opposite riparian proprietors, it has appeared that the estate of each proprietor extends to the middle of the stream. Now, according to this rule, if there be a newly-formed island exactly in the middle of the stream, it is equally divided between the two proprietors ; and so it is laid down both by ancient and modern writers.¹ But if one portion of the island approaches nearer to one side of a stream than it does to the other, the greater part belongs to the owner of the nearer estate, according to its approximation thereto. To establish, therefore, how great an extent of property in an island is annexed to the adjoining estates, the vicinity and remoteness of the island from the shore is to be taken into consideration.² This doctrine is agreeable to, and is unques-

¹ Fleta, lib. 3, c. ii. § 6 ; Bracton, lib. 2, c. ii. ; 2 Bla. Com. 261 ; 1 Swift's Dig. 111 ; Schultes, on Aquatic Rights, 117 ; Woolrych, on the Law of Waters, &c. 38 ; Ingraham v. Wilkinson, 4 Pick. R. 268. And see Giraud v. Hughes, 1 Gill & Johns. (Maryland) R. 249 ; People v. Canal Appraisers, 13 Wend. (N. Y.) R. 355 ; Deerfield v. Arms, 17 Pick. (Mass.) R. 41.

² Ibid.

tionably copied from, the Civil Law,¹ which says, — “If an island rises in a river, and is placed exactly in the middle of it, such island shall be in common to them who possess the land near the banks. But if the island is nearer to one side than to the other, it belongs to them only who possess the land next to the banks on that side to which the island is nearest.”²

§ 45. The rules on this subject are very definitely laid down in the code of Louisiana,³ as follows:— “Islands and sand-bars, which are formed in streams not navigable, belong to the riparian proprietors, and are divided among them according to the rules prescribed in the following articles:—If the island be formed in the middle of the stream, it belongs to the riparian proprietors, whose lands are situated opposite the island. If they wish to divide it, it must be divided by a line supposed to be drawn along the middle of the river. The riparian proprietors then severally take the portion of the island which is opposite their land, in proportion to the front they respectively have on the stream, opposite the island. If, on the contrary, the island lie on one of the sides of the line thus supposed to be drawn, it belongs to the riparian proprietors on the side on which the island is, and must be divided among them, in proportion to the front they respectively have on the stream, opposite the island.”

§ 46. Supposing that another island should arise between an island already risen, on one side of the stream, and which belongs wholly to the estate which

¹ 2 Bla. Com. 261.

² Coop. Just. lib. 2, t. 3.

³ Civil Code of Louisiana, Art. 505, 506, 507.

it adjoins, and the opposite banks ; it is declared by Fleta, that the admeasurement of property in the new island shall be made from the first, and not from the shore to which it belongs.¹

§ 47. These provisions, though they appear to be confined to the case of islands recently formed, the same reason will extend them to the case of islands the origin of which cannot be traced, unless the property in them has been *otherwise appropriated*, according to the rules of law ; for whether originally formed by deposits from the water, or by a sudden division of the river, would seem to be immaterial, unless the owner of one side should be able to show it was created by a disruption of his land.²

§ 48. In a case in Massachusetts, the above rules were applied to the following facts:—The island that was in dispute is situated in Pawtucket River, above tide water. The plaintiff was owner of a tract of land on the east side of the river, extending up and down the river, beyond the island ; and the defendant was owner of a similar tract on the west side of the river. The island was not held by any separate grant, by either ; nor did any other person claim it by virtue of any grant, or by possession. Both plaintiff and defendant, and those under whom they severally claimed and held their farms on the main land, had occasionally cut trees on the island ; but no agricultural improvement had been made thereon. In partition of the estate among the heirs of E. B., father of the grantor of the plaintiff, this island was set off to those heirs, in 1756 ;

¹ Fleta, lib. 3, c. ii. § 8.

² Per Parker, C. J., in *Ingraham v. Wilkinson*, 4 Pick. R. 268.

but it did not appear that any possession was taken under the partition, except the occasional cutting of wood, for forty or fifty years past. It appeared, also, that the defendant, or those under whom he claimed, had cut wood on the island, for thirty years past, at pleasure, without any objection having been made, by those who held under E. B. Upon these facts, the Court considered it obvious, that neither the plaintiff or defendant had obtained such exclusive possession of the island, or any part of it, as would enable either to maintain trespass against the other, without referring their possession to some title. And the Court thought it equally obvious, that no title appeared in, either, except what may be derived from their property in the land on either side of the stream of the river, opposite the island. Thus were the Court obliged to consider the principles of law, as above laid down, and the result to which they came was in favor of the plaintiff.¹

§ 49. Where the stream is divided by an island, so that only one fourth of the stream descends on one side of the island, and the residue on the other, the owner of the shore where the largest quantity of water flows, is entitled to the use of the whole quantity flowing there, and the owner of the other shore has no right to place obstructions at the head of the island, to cause one half of the stream to descend on his side of the river.²

§ 50. In a case decided by the Supreme Court of the United States, it was determined, that the boundary of the State of Kentucky extends only to low-water mark,

¹ Per Parker, C. J., in *Ingraham v. Wilkinson*, 4 Pick. R. 268.

² *Crooker v. Bragg*, 10 Wend. (N. Y.) R. 260.

on the Ohio River, and therefore did not include an island separated from the main land by a channel, or bayou, filled with water only when the river rises above its banks, and is dry at other times.¹

§ 51. If a watercourse divides itself, and encircles a field, and thereby forms an island, the property of the field is unaltered, and continues in him to whom it before appertained.²

§ 52. A grant of a river, *eo nomine*, as it will have no effect upon the property in the soil, can convey no property in an island.³ But all islands situated within the limits of a patent, or grant of land, are, of course, included.⁴

¹ *Handly's Lessee v. Anthony*. When a river is the boundary line between two Nations or States, if the original property be in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its domain, and the newly-erected State extends to the river only, and the low-water mark is its boundary. *Ibid.* In 1802, when Georgia ceded her back lands to the United States, she had jurisdiction over the whole of Chattahoochee river from its source to the 31st degree of north latitude. The Supreme Court of the United States held the rule to be, that where a power possesses a river, and cedes the territory on the other side of it, making the river the boundary, that power retains the river, unless there be an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river. *Howard v. Ingersoll*, 13 How. (U. S.) R. 381. And see *Missouri (State of) v. Iowa (State of)* 7 How. (U. S.) R. 660.

² 1 Swift's Dig. 112.

³ *Jackson v. Halstead*, 5 Cowen, 216.

⁴ *Lunt v. Holland*, 14 Mass. R. 149. The boundaries of Mifflin county, in Pennsylvania, were fixed by an act of the legislature of September 19, 1789; and the fact that an island, evidently included by the act within the limits of that county, had been assessed for twenty-eight years in Huntingdon county, in the same State, will not avail to disturb the boundary fixed by the act. If the boundary fixed by the act were *uncertain*, such assessments, for a long period, might be admissible to show where the line was fixed by the act; but are not admissible where the line fixed by the

2. *Alluvion.*

§ 53. Alluvion is the addition made to land by the washing of the sea or rivers; and the characteristic of alluvion is its *imperceptible* increase, so that it cannot be perceived how much is added in each moment of time. The gradual alteration of a stream, will, of course, add to one and diminish the opposite bank. In all cases where the change is so gradual as not to be perceived in any one moment of time, the proprietor, whose bank on the river is increased, is entitled to the addition.¹ The rule of the Common Law, on the subject of allu-

act, viz., the Juniata river, is known. Where the two counties join at Juniata river, at their southern point of junction, their respective boundaries do not extend *usque ad filum aquæ*; but the *whole bed* of the Juniata river, from that point up to "Jack's Narrows," is in Mifflin county, and the islands in the river belong to the latter county. *Johns v. Davidson*, 4 Harris, (Penn.) R. 512.

¹ 2 Bla. Com. 262; 1 Swift's Dig. 111; 3 Mass. R. 352; Schultes, 116; *Morgan v. Livingston*, 6 Martin, (Louis.) R. 19. The reader is also referred to the learned and elaborate discussion in relation to the claim to the *batture* in the city of New Orleans, in vol. 2 Am. Law Journal, 282, 393. And see *Girard v. Hughes*, 1 Gill and Johns. (Maryland) R. 249. Lands were thus described in a deed: "Beginning at the south bank of the Tuscarawas River, where the line between the first and second quarter of the fifth township intersects the same, where there is an old dogwood, with a notch and blaze in it, and a number of shoots springing from the roots, from which a white oak, fifteen inches in diameter, bears south twenty-eight degrees, west, fifteen links; thence south with the division line; thence east, &c.; thence north, &c., seventy-two chains and ten links, to the south bank of the Tuscarawas River, from whence a maple, four inches in diameter, bears south, thirty-six degrees east, eleven links; a forked maple bears south, &c., thence with the course of the south bank of the Tuscarawas River, to the place of beginning." Before that deed was made, about ten acres of *alluvion* had been formed on the southern bank of the river, along the line between the old dogwood and the corner at the maple. It was held, that the alluvion passed by the deed. *Lamb v. Rickets*, 11 Ohio, R. 311. And in this case it was considered a well-established

vion, also, is the same as that of the Civil Law. The latter is thus translated:—“That ground which a river has added to your estate by alluvion, becomes your own, by the law of nations; and that is said to be alluvion which is added so gradually that no one can judge how much is added in each moment of time.”¹

§ 54. The case of the King *v.* Lord Yarborough, involved the right of soil connected with *tide water*; but the case is important as connected with the subject of this work, inasmuch as the argument in it was upon the word “*imperceptible*.” In behalf of the crown two passages were cited from Hale’s *De Jure Maris*, wherein that writer speaks of land gained by alluvion, as belonging generally to the crown, unless the gain be so insensible, that it cannot *by any means*, according to the words of one of the passages, or *by any limits or marks*, according to the words of the other passage, be found, that the sea was there; *idem est non esse et non apparere*. This led to the following interpretation of the legal meaning of the word “imperceptible” by the Court, the opinion being delivered by Abbott, C. J., as follows:—“In these passages, Sir Matthew Hale is speaking of the legal consequence of such an accretion, and does not explain what ought to be considered as accretion insensible or imperceptible in itself, but considers that as being insensible, of which it cannot be said, with certainty, that the sea ever was there. An accretion extremely minute, so minute as to be imper-

principle, that formations by *slow and gradual accretion*, belong to the owner of the land, when made by a *stream forming his boundary*, and opposite thereto.

¹ Coop. Just. lib. 2, tit. 1.

ceptible even by known antecedent marks or limits at the end of four or five years, may become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered, that if the limit on one side be land, or something growing or placed thereon, as a tree, a house, or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but in part also upon the strength and direction of the wind, which are different almost from day to day. And, therefore, these passages from the work of Sir Matthew Hale are not properly applicable to this question. And, considering the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time. And taking this to be the meaning of the word 'imperceptible,' the only remaining point is, whether the accretion of this land might properly, upon the evidence, be considered by the jury as imperceptible. No one witness has said that it could be perceived, either in its progress, or at the end of a week or a month. One witness, who appears twice to have measured the land, says, 'that within the last four years, he could see that the sea had receded,' but he could not say how much; the same witness said, 'that it certainly had receded since he measured it last year,' but he did not say how much; and, according to his evidence, the gain in a period of twenty-six or twenty-seven years, was, on the average, about five

yards and a half in a year. Another witness speaks of a gain of 100 to 150 yards in fifteen years ; a much greater increase than that mentioned by the first witness ; and this second witness adds, that during the last five years there had been a visible increase in some parts of from thirty to fifty yards. Upon the evidence of this witness, it is to be observed, that he speaks very loosely, the difference between 100 and 150 in fifteen years, and between thirty and fifty in five years, being very great. The third witness said there had been some small increase in every year. The fourth witness said, 'the swarth increases every year gradually, and *perhaps* it had gathered a quarter of a mile in breadth in some places within his recollection, or during the last fifty-four or fifty-five years, and in some places it had gathered nothing.' And this was the whole evidence on the subject. We think the jury might, from this evidence, very reasonably find that the increase had not only been slow and gradual, but also 'imperceptible,' according to the sense in which, as I have before said, we think that word ought to be understood."¹

¹ The King v. Lord Yarborough, 3 B. & Cress. R. 91 ; S. C. 10 Eng. Com. Law R. 19 ; S. C. affirmed in the House of Lords, 2 Bligh (N. S.) R. 147 ; 1 Dow (N. S.) R. 176. In the controversy respecting the *batture* at New Orleans, when it was urged, that it was not alluvion, because its increase *was perceptible*, after every swell of the Mississippi, it elicited from Mr. Livingston the following reply : " When the ingenious counsel can analyse the different deposits, separate the sands of the Red River, the rich mould of the Missouri from the clay and other various soils which the Mississippi receives from a thousand tributary streams ; when he can dive into its turbid eddies, watch the moment of the precious deposit, and date the existence of each stratum of its increase ; then this first branch of the authority he has cited, (*quantum quoque temporis momento adjiciatur*) may be applicable to his cause." 2 Hall's Law Journ. 307. " Alluvium, or alluvial deposits, a name given to those accumulations of sand, earth, and .

§ 55. Land formed by alluvion in a river, is, in general, to be divided among the several riparian proprietors

loose stones or gravel brought down by rivers, which, when spread out to any extent, form what is called *alluvial land*.

“ There are three successive stages in the formation of alluvium, viz. : the crumbling of the mineral crust of the earth, by the action of tides, currents, streams, and atmospheric agency ; the transportation of the loosened fragments ; and their deposition in the form of alluvium at the bottom of rivers, lakes, æstuaries, and the ocean.

“ The mineral substances of most rocks have a tendency to combine with the oxygen of the atmosphere, under particular conditions of heat, moisture, and electricity ; carbonic acid and water are absorbed by many rocks ; vicissitudes of temperature tend to expand, contract, split, and disintegrate rocks ; lightning often shivers a rock into innumerable fragments ; every shower of hail or rain washes off fragments more or less numerous from the surface of rocks ; so that by these combined agencies of air, moisture, carbonic acid, heat, electricity, hail, and rain, there is a constant wearing away of the substance of solid rocks. It is true that these agencies work very slowly, when the bulk of the rock is considered ; but as time, in geological phenomena, is reckoned by ages or centuries instead of by years, this slowness does not throw any improbability over the alleged action of meteoric forces on solid rocks.

“ Another kind of agency is the power of a running stream to wear away the banks and rocks against which it rubs. The force of water, when directed against any obstacle in its course, is very considerable, even by its own weight alone, especially if it be flowing over a highly-inclined surface ; but its destructive power is greatly augmented if it be loaded with sand and gravel. In floods, very considerable blocks are carried by the stream to great distances, for it must be remembered that these are much more easily moved in water than on land, in consequence of the law in hydrostatics, that a solid body fully immersed in water weighs so much less than it does in air by a sum equal to the weight of the mass of water which it displaces. If the water flows with a velocity of three inches per second, its force, when free from suspended matter, is sufficient to tear up fine clay ; six inches per second, fine sand ; twelve inches per second, fine gravel : and three feet per second, will tear up beds of loose stones of the size of an egg. Instances have been recorded in most countries of masses of stone, weighing from a hundred to a thousand pounds each, having been transported many miles by the force of a current.

“ The formation of *valleys* by the erosive power of running water is another cause of the accumulation of alluvium. The explanation of this subject more fittingly belongs to another article [VALLEYS] ; but it may here

entitled to it, according to the following rule : Measure the whole extent of their ancient line on the river, and

be observed that there is abundant proof of the power of water to cut a passage through solid rock. In Sicily, the river Simeto has cut a passage for itself through a bed of very hard rock, fifty feet deep, and several hundred feet wide. The river Nerbudda in India has worn away a rock to the depth of 100 feet. Among the Alps, gorges have been scooped out to the depth of 600 or 700 feet, by the action of running water alone. Such facts as these are sufficient to show that a rapidly-flowing river exerts a powerful disintegrating force.

“ The wearing and transporting powers of rivers depend upon the volume of water, the quantity and size of the solid matter suspended, and the velocity with which it moves. A river generally runs with greatest rapidity in the higher parts of its course, where indeed it often consists of a succession of torrents and cataracts for many miles, but it has not yet acquired its full destructive force, because the mass of water is still comparatively small, nor has it yet become loaded with solid matter. In the lower part of its course, long before it joins the sea, it has usually reached a level country, and there its velocity becomes greatly retarded. The loss of destructive power, by diminished velocity in the level country, is sometimes compensated, in a considerable degree, by the effects produced by the weight of the great volume of water impinging upon certain parts.

“ The tortuous courses of rivers when they are cut through solid rock, as in the case of the Moselle, whose banks are sometimes 600 feet high, are among the strongest proofs of the destructive power of running water ; for no sudden deluge, however powerful, could have scooped out such a trough ; and that a cleft of such a nature should be occasioned by any disruption of the earth's crust, is not less improbable. More sudden, and therefore more striking, instances of the waste of the land occur where a river flows through a lake, and by its wasting action causes a breaking down of the barrier.

“ The distance to which the detached fragments are carried depends upon the volume of water, and the nature of the ground over which it flows. The torrents from the south-western Alps, rushing over a steep uninterrupted slope, transport large blocks to the sea ; but a river that runs through a long stretch of level country deposits the grosser matter in the upper part of its course, and carries to its mouth only that which is more easily held in suspension. The larger stones, after being detached from their parent rock, have therefore to undergo an intermediate process of abrasion, by being rubbed against each other in the bed of the stream before their particles are finally committed to the deep. If a river pass through a lake in its course, the solid matter will be deposited in that

ascertain how many feet each proprietor owned on this line; divide the newly formed river line into equal

trough until it has filled it up; and if the lake be very large, even the lighter particles will have time to fall, and the water will flow out clear from the other extremity. Such processes are now going on, by the gradual filling up of the Lake of Geneva by the Rhone, of the Lake of Constance by the Rhine, of the Lake of Wallerstadt by the Linth, and of many other lakes which have rivers flowing through them. In other cases, the bed of the river itself is gradually being raised by the deposition of this alluvium, and the river is often turned out of its course. This process has gone on at such a rate in Lombardy, that the inhabitants are obliged to make artificial banks to confine the river Po within its proper limits.

“In a mountainous country, where the land rises rapidly from the shore, the rivers descending over a steep bed sweep all the contents into the sea. If the neighbouring sea be deep, and the tides be strong, an estuary or inlet is formed at the mouth of the river—that is, the sea forms a deep indentation into the land, of a triangular shape. If, on the other hand, a low shelving shore, and the absence of strong tidal currents, favor the gradual and tranquil deposit of the solid matter brought down by the river, an extensive level of alluvial land is formed. In this case the main river, at a distant point inland, often divides itself into two streams, which, gradually diverging until they reach the sea, inclose a triangular space of land having the form of the fourth letter of the Greek alphabet, Δ , and hence called a *delta*. The mass of water does not, however, long continue divided into two streams only, the process of separation is repeated several times, and thus the delta is traversed by several channels, and the great river empties itself into the sea by many mouths. Such a delta is formed at the mouths of the Nile, Ganges, Rhine, Rhone, Po, Danube, Wolga, Indus, Orinoco, and many other rivers. Great as is the amount of new land thus formed, it is but insignificant in comparison with the quantity of solid matter carried down by rivers and deposited in the depths of the sea. The quantity of mud and sand poured by the Ganges into the Bay of Bengal is so great, in the flood season, that the sea recovers its transparency only at the distance of sixty miles from the coast. Mr. Lyell shows that supposing the water to contain one hundredth part of solid matter, a mass equal in bulk to the greatest of the Pyramids of Egypt, is brought down by the Ganges every day. If a current runs across the mouth of such a river, it gives rise to the formation of a sand-bank, and greatly accelerates the accumulation of the delta.

“Such, then, are the numerous modes in which alluvium is formed, and fitted to become the basis of a rich vegetable soil, by converting into dry land tracts which were before covered with water.

parts, and appropriate to each proprietor as many of these parts as he owned feet on the old line ; and then draw lines from the points at which the proprietors

“ Besides this erosive action of rivers, there is an enormous power due to the sea itself. An extensive waste of the land is in constant progress along every line of coast which presents an abrupt face to the sea. The amount and rapidity of that waste depend upon a variety of circumstances ; the nature of the rocks of which the cliffs are composed, according as they are capable of long resistance, or are easily acted upon by the weather and the sea ; the force of the tides and currents ; the greater or less frequency of storms ; — all these accelerate or retard the destructive force of the ocean. In this case also, as well as in the action of running water on the land, the force is greatly augmented when the water is charged with solid matter. The violent surge of a tempest dashing against a cliff, detaches large blocks, and sweeps them away ; but the next returning wave hurls them back again against the cliff, and thus a powerful artillery is supplied by the land for its own destruction. The east and south coasts of Great Britain, the Shetland and Orkney Islands, the shores of Denmark, and many other sea-coasts of Europe, show evident signs of the power of the sea to encroach upon and wash away the cliffs ; thereby adding to the quantity of alluvium brought down by the rivers.

“ The instances of this destructive power are numerous, and are made evident by the circumstance that buildings which once stood far inland are now close to the cliffs, the sea having gradually washed away the intervening rock. At Sherringham on the Norfolk coast, at Reculver in Kent, and at many other places, this is observable. Geologists are of opinion that England once formed a part of France ; the cliffs on the opposite side of the Channel are identical at the Straits of Dover ; and between Folkestone and Boulogne a submarine chain of hills is in some places only fourteen feet below the surface at low water. From the German Ocean to the Straits the water becomes gradually more shallow, diminishing in a distance of 200 leagues from 120 to 18 fathoms ; and in the same manner from the Straits to the mouth of the English Channel there is a gradual increase of the depth of the water, so that at the Strait there is a ridge with a fall to the west and to the east. In the wearing of the sides, and consequent widening of the Straits, which is now going on, we see only an advanced stage of a work of destruction which has been many thousand years in operation. That Sicily was at one time united to Italy, Ceylon to Hindostan, and the West India Islands to the continent of America, are in like manner deemed very probable hypotheses, the destructive power having in each case been the same, viz. the sea.” *Nat. Cyclopædia*, Vol. I. tit. ALLUVIUM, p. 510 – 513.

respectively bounded on the old, to the points thus determined as the points of division on the newly formed shore. This rule is to be modified, under particular circumstances; for instance, if the ancient margin has deep indentations, or sharp projections, the general available line on the river ought to be taken, and not the actual length of the margin, as thus elongated by the indentations or projections.¹

§ 56. Analogous to the decision in the case cited in the preceding section, is the rule as to the apportionment of *flats-ground*, in Massachusetts and Maine. In *Emerson v. Taylor*, in the latter State,² the question was in respect to the side lines of water-lots, from the upland to low-water mark, under the colonial ordinance of 1641. The language of the ordinance referred to, is, that "in all creeks, coves, and other places about and upon salt-water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to low-water mark, where the sea doth not ebb, above a hundred rods, and not more, wheresoever it ebbs and flows." The expression "to low-water mark," seemed to the Court to imply to the low-water mark in the nearest direction, and without any regard to the course of the side lines of the upland to which the flats are adjoining and appurtenant.³ Such a construction ap-

¹ *Deerfield v. Arms*, 17 Pick. Mass. R. 41. The Court in this case, adopted the rule found in a work of the Civil Law, entitled, a Collection of New Decisions, by Denisart, published in France in 1783, and is found under the title *Atterrissement*. See *Kennebec Ferry Company v. Bradstreet*, 15 Shep. (Me.) R. 374.

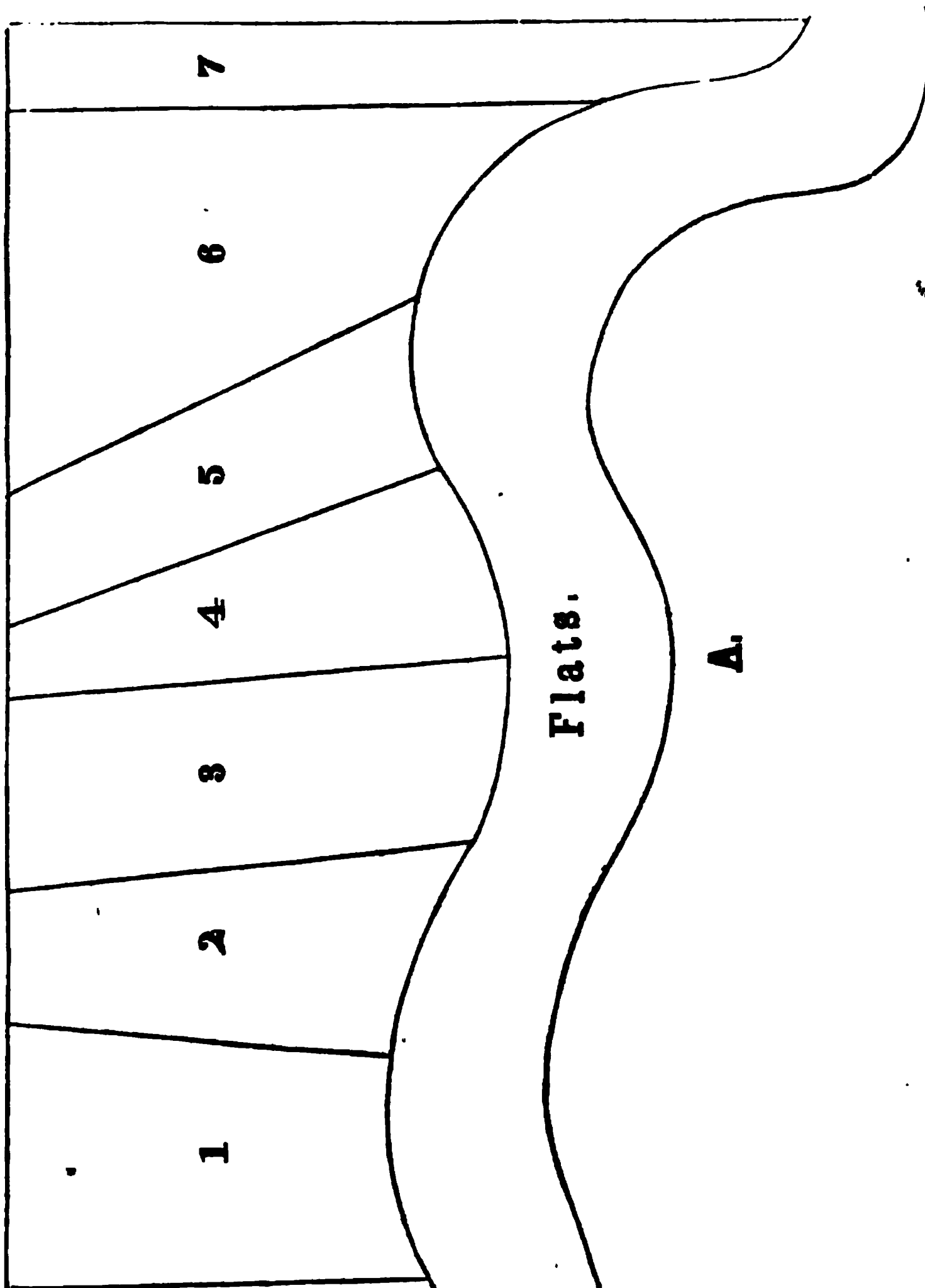
² *Emerson v. Taylor*, 9 Greenl. (Me.) R. 44.

³ And the Court appear to have adopted this construction in *Rust v. Boston Mill Corporation*, 6 Pick. (Mass.) R. 158; and *Knight v. Wilder*, 2 Cush. (Mass.) R. 199; *Sparhawk v. Bullard*, 1 Met. (Mass.) R. 95, 106.

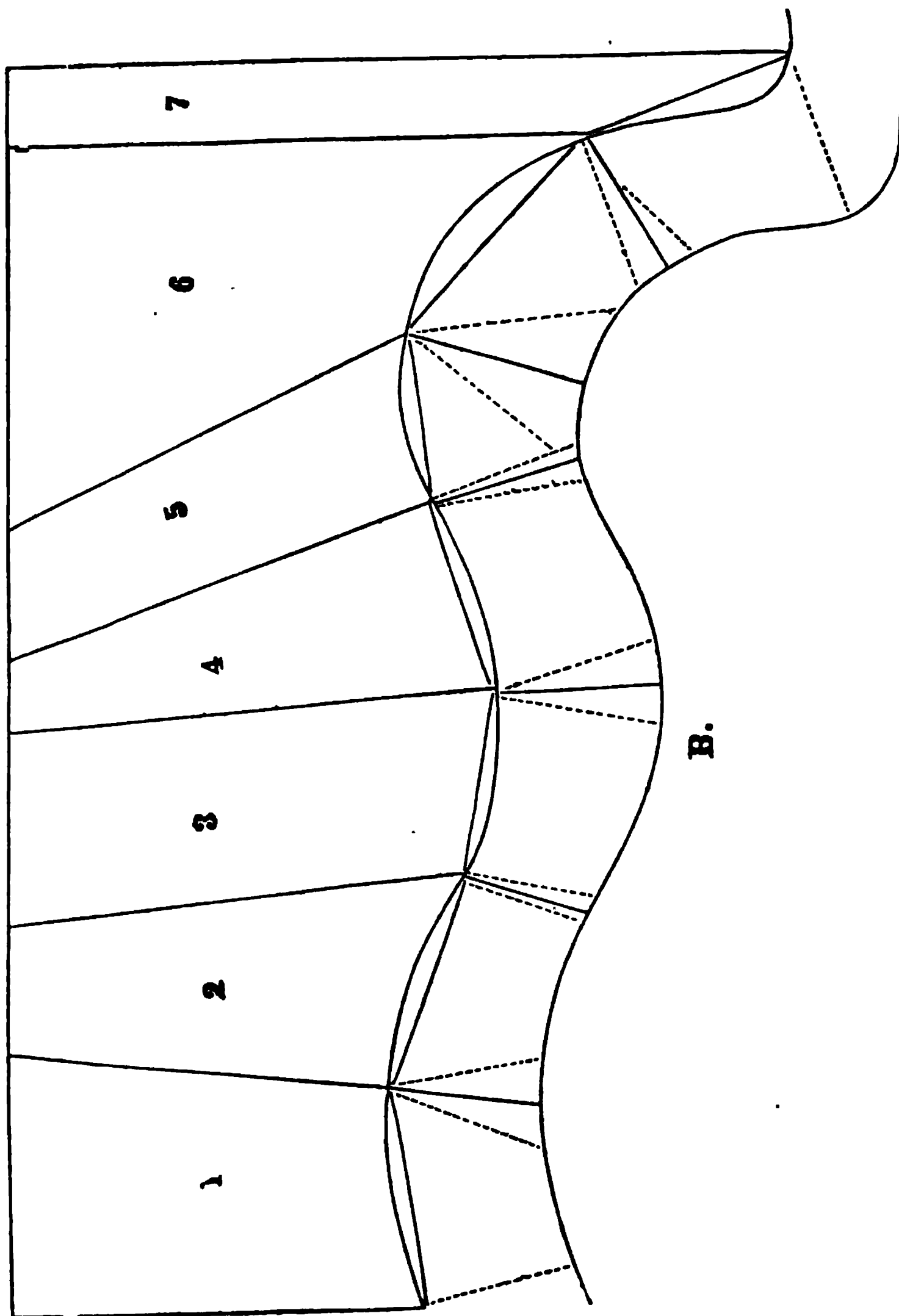
peared to the Court more consistent than any other with the respective rights of contiguous owners of upland ; and in some cases, the Court considered, where the upland adjoins a cove, and the contiguous lots are so laid out or bounded, as that their side lines strike the cove, (as some of them necessarily must,) obliquely, the above rule must be applied as the general rule of construction ; otherwise, the extension of the side lines and one of the upland lots in a straight direction, might, in some cases, deprive an adjoining lot of all benefit of the flats ; and according to the plan on the following page, marked A, it would cut off from lot No. 6, most of the benefit of the flats adjoining it.

The Court, in giving their opinion, say :—“ After a careful examination of the subject, we perceive but one construction, or application of the principle of the ordinance which will do justice to all concerned. The mode of applying the principle is this. Draw a base line from the two corners of each lot, where they strike the shore ; and from those two corners, extend parallel lines to low-water mark, at right angles with the base line. If the line of the shore be straight, as in the case before us, there will be no interference in running the parallel lines. If the flats lie in a cove, of a regular or irregular curvature, there will be an interference in running such lines, and the loss occasioned by it must be equally borne, or gain enjoyed equally by the contiguous owners, as appears by the following plan, marked B. By the foregoing plan it will be noticed, that the parallel lines, running at right angles with the base lines are merely dotted ; while the base lines and the true division lines between the flats, belonging to the respective upland lots, are distinctly drawn. It will also be seen that each of the lots 1, 2, 5, 6, have their

appurtenant flats converging from the upland to low-water mark, in consequence of the recess and curvature of its margin; while the lots 3 and 4 have their appurtenant flats wider at low-water mark than where they join the upland, in consequence of the projection of each lot into the stream. On the same principle,



where there is an extended projection of upland of any form, or an island, belonging to different owners, each one's lot being bounded on the sea, or the tide water in which the island is situated, the surplus width of



the flats at low-water mark, arising from the form of the upland, must be divided among the contiguous owners of such upland, and the mode of division and the result are to be ascertained by drawing base and parallel lines in the manner before mentioned, and then making an equal division of the surplus. By this process, justice will be done, and all interference of lines and titles prevented. We are not aware of any cases, where, in apportioning appurtenant flats among contiguous owners of upland, the foregoing principles and mode of proceeding would not be properly applicable as the rule of decision. Still we do not undertake to affirm that there may not be some peculiarity in the form of the upland to which flats are appurtenant, and some peculiarity of manner in which the upland may be divided among contiguous owners, the effect of which we have not anticipated, which would vary the principle. Should any such cases hereafter present themselves, requiring the application of a different principle, such new principle must of course be applied."

§ 56 *a*. In *Newton v. Eddy*, in Vermont,¹ it appeared that the corner named in certain deeds was a tree on the west bank of the stream, and the point in the centre of the stream nearest to the tree, at the date of the deeds, was easterly from the tree, and in the continuation of the line between the proprietors extending from the west to the tree — the stream then running by the tree from the south northerly; but by

¹ *Newton v. Eddy*, 23 Vt. R. 319. Plan of the premises. From *a* to *c*, original bank of Otter Creek. *b*, Butternut tree. From *a* to *b*, old fence.

[For plan, see next page.]

the changes in the course of the stream *alluvion* was formed upon its west bank, and the direction of the stream was changed, so that it flowed by the tree from the east towards the west, and the point in the centre of the stream nearest to the tree became north of the tree, so that a line extending from the tree to that point was nearly at right angles with the line extending from the west to the tree; and it was held, that the location of the true corner was thus changed to the point in the centre north of the tree, and that all the alluvion, formed upon the west bank of the stream above that point, belonged to the party who owned the land above the tree; REDFIELD, J., dissenting.

3. Reliction.

§ 57. If the course of a river is *suddenly* changed, the relicted soil remains according to the former bounds. A watercourse, therefore, running between the lands of A and B, which leaves its course, and suddenly and sensibly makes its channel entirely on the land of A,

wholly belongs to A.¹ Where a deed calls for a line along the bank of a river, and, after the date of the deed, the bank of the river is changed by excessive floods producing violent and visible alterations, the boundary will not shift with the change of the river, but will be where the bank was at the time of the date of the deed.² But if a river, *by degrees*, says Blackstone, gains upon the land of a person on one side, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy.³ A river ran between two lordships, and the soil of one side, together with the river, entirely belonged to one of the lordships; and the river, by very slow degrees, did encroach upon the soil of the opposite lordship; but so very deliberately, that it was impossible to perceive an immediate alteration; therefore, by this imperceptible increase, the land relict became the property of the first lord. But if the river, by a sudden and unusual flood, had gained hastily a great parcel of the other lord's ground, he should still be entitled to the same.⁴

¹ Harg. Tracts, *De Jure Maris*, &c.

² *Lynch v. Allen*, 4 Dev. & Bat. (N. C.) R. 62. But the Court in this case took occasion to say that if the alteration had been by small and almost imperceptible gradations, it might have been otherwise.

³ 2 Bla. Com. 262. And see *Brown v. Kennedy*, 5 H. & Johns. (Md.) R. 195; *Lynch v. Allen*, *ub. sup.*

⁴ 22 Lib. Ass. pl. 93. The changing of the bed of the river Connecticut, in the town of Weathersfield, has been the occasion of much litigation in that town, respecting the title to the soil. Mr. Butler, who owned a tract upon which the river was encroaching, found, after a while, some of his land appearing on the opposite side of the river, and accordingly laid claim to it. This claim was disputed, as he never owned land on *that* side of the river. It was a long while before this case was decided. There appeared some difficulty in making the jury who sat on the case to understand the merits of the question. Mr. Ingersoll, a member of the Ingersoll

§ 58. When we treat of such watercourses as are public highways, it will appear that a river of this description, by constituting to itself a new channel, may convert a private field into public property; that is, the new channel becomes public for use and accommodation, and cannot be impeded or obstructed. So on the other hand, a river, by changing its course, may cause the channel, which was before subject to the right of the public, to vest entirely and exclusively in the owners of the banks. The law of England, in relation to this subject, also appears to have been copied from the Roman law.

§ 59. If a navigable *lake* recede gradually and insensibly, the derelict land belongs to the adjacent riparian proprietors. In a case in North Carolina, the defendant claimed title to the land which was the subject of the suit under a patent, in which the boundaries were described as follows: "Beginning at a poplar *on the south side of Mattamuskeet Lake*; thence running west with the lake, to a corner; thence different courses and distances to a corner *on the lake* again; and thence *with the lake* to the beginning." The lessor of the plaintiff had obtained a grant of late date, covering lands, as he alleged, between defendant's lines and the lake, which had *become dry* by the *recession* of the lake since the patent to the defendant was issued, as stated by the plaintiff. Both sides gave

family of New Haven, was the counsel employed by Mr. Butler. He illustrated the case by supposing that Mr. B. had built a castle on the land in question. Although the ground on which it stood might be overflowed, it was still his castle, and the ground also was his on which it stood, and he had a right to his property wherever he could find it. The case was finally determined in accordance with these views. [From Hayward's New England Gazetteer.]

evidence of what had been actually run for the lines of the defendant's land; and it was proved that the lake was a navigable water. By HALL, J., in delivering the opinion of the Court,—“If the recession of the lake was sudden and sensible, the land which it had covered, and which, by its dereliction, became dry, would not, and ought not, to be included in the defendant's grant. But, if the water receded gradually and insensibly, the lake ought to be considered one of the defendant's boundaries. It is, therefore, necessary that the fact be found, whether the waters of the lake receded imperceptibly or not from the land in dispute; because, on that question, the rights of the parties depend.”¹

4. *Avulsion.*

§ 60. Avulsion is where, by the immediate and manifest power of the stream, the soil is taken suddenly from one man's estate, and carried to another; and hereby a property is *only* constituted *by acquiescence*; for it belongs to the first owner, unless it shall continue on the other's land for so long a time that it cements and coalesces with the soil.² So the Civil Law says,—“If the impetuosity of a river should sever a part of your estate, and adjoin it to that of your neighbor, it is certain that such part would still continue yours.”³

¹ *Murry v. Sermon*, 1 Hawks, (N. C.) R. 56.

² Bract. 221; 2 Bla. Com. 262; Harg. Tracts, *De Jure Maris*, &c.

³ Coop. Just. lib. 2, tit. 1.

CHAPTER III.

OF THE RIGHT OF FISHERY AS INCIDENT TO THE RIGHT OF
PROPERTY IN A WATERCOURSE.

1. Exclusive Right of Fishing in the Riparian Proprietors.
2. Of a Several Fishery.
3. Of a Free Fishery.
4. Of Common of Fishery.
5. Right of Fishery, as derived from Special Grants.
6. User of Private Fisheries.
7. Obstruction of the Passage of Fish.

1. *Exclusive Right of Fishing in the Riparian Proprietors.*

§ 61. It will be seen, by reference to the first chapter, that where a person owns the whole of the soil over which a watercourse runs, in its natural course, he alone is entitled to the use and profits of the water; and that where a person owns only the land upon one side of a watercourse, his interest in the soil, and his right to the water, extends to the middle of the stream. Concomitant with this interest in the soil of the beds of watercourses, is an exclusive right of fishery; so that the riparian proprietor, and he alone, is authorized to take fish from any part of the stream included within his territorial limits.¹

¹ 2 Bla. Com. 39. Harg. Tracts, *De Jure Maris*, &c. Hale, in the latter work, cites *Baker v. Hercy*, temp. Ed. I.; *Owen v. Dunch*, 2 Jac. B. R.; 3 Kent's Com. (last ed.) 411. And see the opinion of the Court in *Gould v. James*, 5 Cowen's R. 369; *Hart v. Hill*, 1 Whart. (Penn.) R. 124; *People v. Platt*, 17 Johns. (N. Y.) R. 195; *Hooker v. Cummings*, 20 Johns. (N. Y.) R. 90.

§ 62. The opinion which has formerly pervaded the minds of many people, that, in this country, the public may fish anywhere, is refuted by a case in the United States Circuit Court in Rhode Island, at the November term, 1828. The action was trespass, for entering the plaintiff's close, partly covered with water, and taking fish from his mill-pond. The principal question was, whether the plaintiff had any property in the fish. The title of the plaintiff was under a lease of five hundred years, of a certain factory lot, and dam lot, "together with all the land which may be flowed by raising a dam seven feet high from the bed or bottom of the river." The Court said, that the lease having conveyed all the land under the pond, it passed the water and the fish therein to the plaintiff, as incidents to the principal grant.¹

§ 63. In a case in Massachusetts, the defendant undertook to give evidence of a *custom* for all the inhabitants in the vicinity to take fish in the plaintiff's mill-pond; and that the pond was merely an enlargement of a natural stream. But the Court asserted, that there was no such general right as was suggested; and as to the custom, it might be sufficient to say, that, if it were legal and could be proved to exist, it would not be a defence under the general issue. But the custom proposed to be proved, was not one that could be sustained in law, even if specially pleaded; for a custom to take any thing from another's land, or for profit *a prendre*, is not a lawful custom; and if such a right be available at all, it must be set up by

¹ Smith v. Miller, 5 Mason, (Cir. Co.) R. 191.

prescription, as belonging to some estate, and should be pleaded with a *que estate*.¹

§ 64. The Supreme Court of Massachusetts, upon another occasion, observed, — “One of the earliest, and, it seems, the most frequently occurring subjects of legislation, has been that of the fisheries in the numerous streams which communicate with the ocean in this Commonwealth. Though a source of support and profit to multitudes of people, it was found also to be a fruitful source of disorder and contention, growing out of the conflicting rights of individuals, as well as of towns, which, by being owners of land, become owners of the banks of rivers which afforded convenience for fishing. The regulations which have been deemed, from time to time, expedient, qualify and explain private right upon this subject; but beyond these regulations the *right of property according to the principles of the Common Law, is left unaffected*.”²

§ 65. The rule, that the right of fishery, within his territorial limits, belongs exclusively to the riparian owner, extends alike to great and to small streams. Thus, the owners of farms adjoining Connecticut river, above the flowing of the tide, have the exclusive right of fishery, opposite their farms, to the middle of the river; though the public have an easement in the river,

¹ *Waters v. Lilly*, 4 Pick. R. 145. It was thus decided, the Court said, in *Gatewood's case*, 6 R. 60; and Coke says, “Note reader the law in this general case well resolved, and no book in the law is adjudged against it.” And in the case of *Grimstead v. Marlow*, (4 T. R. 718,) Lord Kenyon says, — “The law has been so settled ever since the time of *Gatewood's case*.”

² *Commonwealth v. Chapin*, 5 Pick. R. 199.

as a highway, for passing and repassing with every kind of water-craft.¹

§ 66. Under the local law of Massachusetts, by which towns may appropriate the fish, in tide waters, if not appropriated by the legislature, no man, says PARSONS, C. J., *can lawfully go on the soil of another, without his leave*; and if no such appropriation has been made, any citizen may take the fish, "*so that he does not trespass on the land of others.*"² In a very early case in the same State, the defendant claimed the right of going over the plaintiff's land to the river Merrimack, but he relied solely on prescription.³ In South Carolina, where a person living on an island had a navigable watercourse from his own door to the highway, of no greater distance than to pass through his neighbor's field, the Court held, that it was not such *necessity* as gave him a right of way over the field.⁴ In *Cortelyou v. Van Brundt*, in New York,⁵ it was held that the common right of fishing, even in *tide waters*, gives *no* power over the adjoining land. And, though both commerce and fishing, and bathing *in the sea*, are matters favored by the Common Law, by reason of public and national benefits to be derived from them, they do not, because the waters of the sea are open to all persons for all lawful purposes, afford a universal right of access to them over land which is private property.⁶

¹ *Adams v. Pease*, 2 Conn. R. 481.

² *Coolidge v. Williams*, 4 Mass. R. 440.

³ *White v. Whittier*, 2 Dane's Abr. 702.

⁴ *Lawton v. Rivers*, 2 McCord (S. C.) R. 445, cited in 2 Rice, Dig. 356.

⁵ *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) R. 357.

⁶ See *Blundell v. Catterall*, 5 B. & Ald. R. 268.

§ 67. The riparian proprietor has the sole right, unless he has granted it, to fish with *nets* or *seines* in connection with his own land.¹ It was expressly held, also, in *Lay v. King*, in the Supreme Court of Errors of Connecticut,² that an adjoining proprietor on the river Connecticut, near its mouth, had an exclusive right to draw a seine on his own land; though the right of fishery in that part of the river was free and common to all the citizens of the State. This exclusive right is considered to give all the owners of land on the margin of the river Schuylkill such great advantages, that it has been hardly worth while for any other persons to attempt to fish with seines. The right of property in front of the river is therefore valuable, and is called a fishery, and one which, in some places is rented for a considerable sum annually.³ Where certain persons had landed, with their nets, on the bank of a navigable river, and had, at various times, dressed and improved the landing place, it was held, that it was properly left to the jury to presume a grant of the right of landing for that purpose, by the owner of the shore. In this case, it was remarked by BURROUGH, J., that every act done by the plaintiffs for *forty-six* years, on the *locus in quo*, would have been a trespass, if they had not a right of landing with their nets there; but from 1774, to the present time, all these acts had been done openly; and the only question was, whether there were any facts from which

¹ *Hart v. Hill*, 1 Whart. (Penn.) R. 138; *Coolidge v. Williams*, 4 Mass. R. 140; *Brink v. Richtmyer*, 14 Johns. (N. Y.) R. 255.

² *Lay v. King*, 5 Day, (Conn.) R. 72.

³ Per Tilghman, C. J., in delivering the opinion of the Court in *Shrunk v. Schuylkill Nav. Co.* 14 S. & Rawle (Penn.) R. 71.

a judge could leave it to a jury to presume a grant of the right in question; and, undoubtedly, the circumstances were such as could scarcely have occurred without the knowledge of the owner.¹ The right of landing with, and drawing seines upon another's land, is undoubtedly an *easement*,² and, therefore, as in the case just above referred to, may be acquired by prescription, like a right of way.

§ 68. This right of fishery, growing out of an ownership of the soil, is subject to *dower*; that is, a woman may be endowed of one third part of the profits.³ It would seem, however, that dower cannot properly be claimed in a fishery, unless it is attached to, or connected with *lands*, of which the husband was seised; and, therefore, in a fishery disunited with ownership of the soil, it is doubtful whether dower would arise.

§ 69. Where a fishery belongs to co-heirs, they shall have the second, third, or fourth fish, according to the number of persons entitled.⁴

¹ *Gray v. Bond*, 2 Brod. & Bing. R. 667, and 6 Eng. Com. Law R. 368. At all the fisheries in the river Tweed, the workmen exercise the right of walking over and along the adjoining shore, while drawing their nets from the river. They also exercise the right of drawing their nets on the adjacent banks, called "a net green." But this right is considered as a mere easement, which may be presumed by twenty years' enjoyment. 28 Lond. Law Mag. 337; and see 3 Mees. & Welsb. (Exr.) R. 229; 4 Ib. 256, 496; 5 Ib. 233; 6 Ib. 795. Acts of Parliament have from time to time been passed in England, to give parties engaged in the herring fisheries a right to use the adjoining lands in certain cases. 1 Jac. I. 23; 29 Geo. II. c. 23, s. 2; 30 Geo. II. c. 30, s. 7; 11 Geo. III. c. 31, s. 11.

² *Hart v. Hill*, Whart. (Penn.) R. 138. A right of way must be by grant or prescription; mere convenience gives no right. *Seabrook v. King*, 1 N. & McCord, (S. C.) R. 140; *Lawton v. Rivers*, 2 McCord (S. C.) R. 445.

³ Bac. Abr. Dower.

⁴ 3 Bract. 2 b. c. xxxiv. s. 1.

§ 70. In one case,¹ it was moved, that ejectment does not lie for a fishery; on which point the Court doubted; but to avoid the question, the plaintiff released his damages, and the question was not agitated. But where a fishery is rented with the soil, it is a tenement within the meaning of the statute of 9 and 10 William 3, ch. xi., so as to entitle a person renting it, to a parochial settlement. And, it seems, a fishery, without the soil, would have the same effect. In the case where this point was determined, Mr. J. ASHURST laid it down as law, that a fishery is a tenement; that trespass will lie for an injury to it; and that it may be recovered in ejectment.² In this case, BULLER, J., said, the fact of letting a fishery is sufficient, and we must presume the soil passed along with it; but he was by no means ready to allow that if it had been any other kind of fishery, it would not have given a settlement.

2. *Of a Several Fishery.*

§ 71. The exclusive right of fishery, we have just considered as being identified with the property in the

¹ Cro. Jac. 146.

² 1 T. R. 358. That trespass will lie; *Hart v. Hill*, 1 Whart. (Penn.) R. 124. The incompetency to bring ejectment, respects the incorporeal right, because, where the soil is in question, any fishery incident thereto will pass along with it. But the difficulty arises when the privilege is independent of the land. Ejectment was brought for a lease of a house and lands, and of a *free* fishery in the Trent, and, amongst other things, it was moved that ejectment lay not for a fishery; that it did not appear in what vill the piscary was, and that entire damages had been given. The plaintiff upon this released his damages totally and his action as to the piscary, and then had judgment, the Court being doubtful upon the point of the fishery. *Molineux v. Molineux*, Cro. Jac. 146. The fishery in that case was not one connected with the *soil*.

the soil, has been usually denominated a *several* fishery.¹ The town of Dorchester, in Massachusetts, in 1633, made a grant in these words, — “It is generally agreed that Israel Stoughton shall build a water mill, if he see cause.” Then follows a grant to him of a wear adjoining to his mill; and no person is to cross the river with a net, or otherwise to the prejudice of the said wear; but Stoughton is to sell the alewives at five shillings per thousand, and the other fish at reasonable rates. The Colony Legislature, in 1634, confirmed the grant to Stoughton and his heirs. It was held that the wear thus granted and confirmed amounted to the franchise of a *several* fishery at that place.²

§ 72. But there seems to have long been a contrariety of opinion, with respect to the point whether the ownership of the soil covered with water, be essential to a several fishery. It would be attended with little use, to cite all the various precedents to which this question has given birth. The weight of authority is much in favor of the negative; and two modern writers,³ who have considered the question with much attention and acuteness, have arrived at the same conclusion, and have expressed decided opinions that a right of several fishery may exist independent of the soil.⁴ This is the doctrine of Sir Edward Coke, who

¹ See the authorities cited, Ante, § 61.

² *Stoughton v. Baker*, 4 Mass. R. 522.

³ Schultes on Aquatic Rights, and Woolrych on the Law of Waters, &c. The latter published in London as late as 1830.

⁴ And see, to the same effect, the authorities cited in Mr. Hargrave's Co. Litt. 122 a. n. 7. Mr. Woolrych, (p. 88,) cites a case as early as 46 Ed. III.

observes, that if a man be seised of a river, and by deed do grant a several fishery in the same, and maketh livery of seisin *secundum formam chartæ*, the soil doth not pass, nor the water, for the grantor may take water there, and if the river become dry, he may take the benefit of the soil; for there passed to the grantee but a particular restricted right, namely, a right only to fish, and the livery being made *secundum formam chartæ*, cannot enlarge the grant; but he may exclude the owner from fishing there, for he has departed with his interest therein.¹ For the same reason, he says, if a man grant *aquam suam* the soil shall not pass, but the piscary within the water passeth therewith.² And where, says Mr. Hargrave,³ is the inconsistency, in granting the sole right of fishing with a reservation of the soil and its other profits? Nor do we understand, he adds, why a *several fishery* should not exist without the soil, as well as a *several pasture*. Much confusion, it has been very happily suggested by Mr. Woolrych,⁴ would be prevented, by calling the sole right of fishery growing out of the property in the soil, a *territorial fishery*; and giving to that the name of several fishery which is enjoyed exclusively by one individual.

§ 73. The exclusive right of fishing being incident to the ownership of the soil, it will be presumed, unless the contrary appear, that such right resides in the owner of the soil;⁵ and hence to an action of trespass

¹ Co. Litt. 122. a.

² Ibid. 4. b; and so held in *Jackson ex dem. v. Halstead*, 5 Cowen's R. 216.

³ Hargrave's Co. Litt. *ut supra*.

⁴ Woolrych, *ut supra*.

⁵ Anon. Loft. 364. The owner of a several fishery, in ordinary cases, and where the terms of the grant are unknown, may be presumed to be

for an injury to a right of several fishery, it is a good plea that the soil and freehold belong to the defendant. To this, however, the plaintiff may reply title to the several fishery, either by prescription or grant, thereby rebutting the presumption of the right of several fishery being still vested in the owner of the soil.¹ A more modern case is cited by Mr. Woolrych,² as proving no more than what might readily be admitted; namely, that the ownership of a fishery will imply a property in the soil, without further explanation.³

§ 74. To constitute a several fishery, it is doubtless requisite that the party claiming it should so far have the right of fishing, independently of all others, as that no person can have a co-extensive right with him in the object claimed. But a partial independent right in another, or a limited liberty, does not derogate from

the owner of the soil. *Somerset (Duke of) v. Fogwell*, 5 B. & Cress. 875. Trespass lies by owner of several fishery. *Hart v. Hill*, 1 Whar. (Penn.) R. 124. Though there is no reason why a person may not have a several fishery *in alieno solo*, yet *primâ facie*, he is owner of the soil, and that presumption is conclusive, if not opposed. *Partheriche v. Muser*, 2 Chitt. R. 658.

¹ 13 Hen. VI. per Paston, J.

² Woolrych on the Law of Waters, &c., 92, 95.

³ *Rex v. Old Arlesford*, 1 T. R. 358. A declaration reciting that defendant had been summoned to answer plaintiff in an action of trespass, charged that defendant, with force and arms, broke and entered a fishery of plaintiff, in a certain part of a river then flowing and being over the soil of one F., and then fished for fish in the said fishery of plaintiff, and the fish of the said fishery of plaintiff, there found, and being in said fishery, chased and disturbed: Conclusion *contra pacem*. Held in arrest of judgment, after verdict for plaintiff: that the declaration was framed in trespass; and that (*semble*) trespass lies for breaking and entering the several fishery of A. on the soil of B.; but the words "sole and exclusive fishery" were not equivalent to "several" fishery; and that no cause for an action of trespass appeared. *Holford v. Bailey*, 8 Adol. and Ell. R. (N. S.) 1000.

the right of the general owner.¹ A several fishery, says Mr. Woolrych, is, as its name imports, an exclusive property. Not but that the territorial owner, or his grantee, or lessee, may give permission to another person to fish, and yet preserve the several fishery. An owner of the above description would still remain seised of his original estate or right; and he would be the several proprietor, although he should suffer a stranger to use a co-extensive right with him.²

3. *Of a Free Fishery.*

§ 75. A *free* fishery has been defined by Sir William Blackstone to be an exclusive right of fishing in a public river; and he says it is a royal franchise, and is considered as such in all countries, where the feudal polity has prevailed; though the making such grants, and by that means, appropriating, what it seems unnatural to restrain, the use of running water, was prohibited for the future by Magna Charta.³ The same writer distinguishes it from a several fishery, by connecting the latter with the ownership of the soil; and from a *common* of fishery, because it is an exclusive right, while the common is not; and then he adds, that a man has a property in the fish before they are caught, which is not the case in a common of piscary. "To

¹ Seymour v. Lord Courtenay, 5 Burr. R. 2814.

² Woolrych, *ut supra*.

³ 2 Bla. Com. 34. "In this country," says the late Ch. J. Swift, "any State has the power of granting this right, though it is an abridgment of the common rights of the people. And as it may be granted, it may be prescribed for. In England, such prescription must be founded on immemorial use and occupation, and is not like prescribing for an easement in the freehold of an individual. In this country, there has been no decision as to the length of time. 1 Swift's Dig. 110.

consider such right," he proceeds, "as originally a flower of the prerogative, till restrained by Magna Charta, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription; and to distinguish it, as we have done, from a several and a common of fishery; may remove some difficulties, in respect to this matter, with which our books are embarrassed." Upon this illustration, Mr. Hargrave has bestowed the following comment: "Though for the sake of distinction, it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers, by derivation from the crown; and though, in other countries, it may be so considered; yet, from the language of our books, it seems as if our law practice had extended this kind of fishery to all streams, whether public or private; neither the register nor the books professing any discrimination."¹

§ 76. Blackstone admits, that there are not wanting respectable authorities which maintain that a free fishery implies no exclusive right, but is synonymous with common of fishery. Mr. Hargrave considers them as convertible terms, and synonymous with each other in regard to their privileges. Mr. Woolrych says, that sometimes a free fishery is confounded with a several, sometimes said to be synonymous with common, sometimes treated as distinct from either; and again, we find it mentioned as a royal franchise. Yet, notwithstanding the diversity of opinions, and the discrepancy of authorities, he thinks that to consider free fishery as the same with common of fishery, will be a reasonable as well as a legal conclusion.² We may add, that the doc-

¹ Note to Co. Litt. 122. a.

² Woolrych on the Law of Waters, &c., 97.

trine that a free fishery is not an exclusive fishery, has been adopted by the Supreme Court of Massachusetts.¹

4. *Of Common of Fishery.*

§ 77. To what has been said, in the two preceding sections, there is but little to be added concerning *common of fishery*. We have endeavored to show that it is the same as *free fishery*. On the strength of the various English authorities, according to Mr. Schultes, it must appear plain and unquestionable, that *libera piscaria* and *communis piscaria* are the same; and they are mentioned, he asserts, in the old authors indiscriminately, without signifying any essential difference.² All the judges, he says, in the case of *Carter v. Murcot*,³ were of this opinion. Mr. J. EYRE entertained the like opinion;⁴ and in *Seymour v. Courtenay*,⁵ it was held that where one has a co-extensive right of fishing with another, (which, by legal construction, implies a common of fishery,) it is a free fishery. In a case in Massachusetts,⁶ as lately as the year 1828, the Court adopted the opinion that a free fishery is only a common of fishery, as most agreeable to authority, and as the most conformable to the popular sense of the term "free fishery" in this country.

¹ *Melvin v. Whiting*, 7 Pick. R. 79.

² Schultes on Aquatic Rights, 67. Mr. Woolrych is clearly of the same opinion. Woolrych on the Law of Waters, &c. 101.

³ *Carter v. Murcot*, 4 Burr. R. 2162.

⁴ *Smith v. Kemp*, 2 Salk. 637.

⁵ *Seymour v. Lord Courtenay*, 5 Burr. R. 2816.

⁶ *Melvin v. Whiting*, 7 Pick. R. 79. This was an action on the case for the destruction of the plaintiff's several fishery. The defendant pleaded the general issue, and soil and freehold in himself. The plaintiff claimed the fishery by prescription. To support his title, he offered in evidence the record of a judgment in a former action between the same parties,

§ 78. Mr. Schultes says, in regard to things or liberties mentioned as common, where they relate to or are exercised by a community, that expression applies to the individual use of every person comprising that community; and therefore common use and public use, in this respect, are the same. It is to be observed, however, he adds, that although a public right, namely, the right of fishing in a public water, may be common, yet it does not hold, *et converso*, that a right exercisable in common in a private fishery, is public; because, in the one case, it is unrestrainable and universal; in the other case, it may extend only to a few individuals.¹

5. *Right of Fishery as derived from Special Grants.*

§ 79. From the foregoing authorities it may be inferred, that property in a watercourse, as derived from the ownership of the land, may be subjected to every kind of restriction by convention and agreement.² It has been very properly asserted, that it is agreeable to natural reason, that where a man has an absolute property in a private river, which he necessarily must have, if he be owner of the estates on each side, he

respecting the fishery at the same place, in which Melvin was defendant and Whiting was plaintiff; which was admitted without objection. That was an action of trespass, in which it was alleged that Melvin entered the close of Whiting, covered with water, and there took fish. Melvin pleaded that he was seised in fee of land on the bank of the river, and that he had, by prescription, a free fishery in the fishery mentioned in Whiting's declaration, in which fishery he, (Melvin,) and all those whose estate he had, fished, and still of right ought to fish, at his or their free will and pleasure. Issue was taken on these allegations; and the jury found that Melvin, and all those whose estate, &c., have been used and accustomed to fish in the fishery at their free will and pleasure, and that Melvin still of right might fish in the fishery.

¹ Schultes on Aquatic Rights, 68.

² And such is the conclusion of Mr. Schultes, *ut supra*, p. 90.

should have the liberty of using it according to his inclination;¹ and the most ancient Common Law authorities are cited in support of this position.² Hence, he may grant the soil covered with water to one for the purpose of a mill, reserving the right to fish. To another he may grant the entire territorial right of fishing on his own estate, reserving the soil, which would give the grantee an exclusive or several fishery, without ownership of soil. Or, he may grant a privilege to fish to several persons, and then they would have a free fishery with him, and his ownership of the soil would not control their right. Or, he may grant the soil to one of them, having such free fishery in common with others, and yet by this means the fishery of the others would not be destroyed, though the former right of fishing of the grantee might be merged by such acquisition.³ So one having the absolute property on one side of a river, may grant a free fishing in his own water, to his neighbor on the opposite side,⁴ by which means his neighbor would have his own predial or territorial fishing, and a free fishing in the same river; the one being a liberty originally coincident with his estate, and the other a right or service due from another estate. Again, continues Mr. Schultes, a man having one side of the stream, may grant an exclusive right to fish to another, and his opposite neighbor might grant a freedom to fish to the same person; and, by this means, the grantees would have a free

¹ Ibid.

² Bract. lib. 4, ch. xxviii.; and *ibid.* lib. 2, ch. xix. s. 4; 46 Ed. III. pl. 21.

³ Schultes, *ut supra*, 91.

⁴ Skinner's R. 667.

fishery and a several fishery in the same river within their respective limits.¹ To illustrate—says the author just referred to—still further, Bracton, in treating of nuisances, says, that if any one shall establish a fishery or a pool, having lands on either side of the water, when his estate is free on every side, and owes no service to the neighboring estate above or below it, (although such a thing may be of some damage to his neighbor,) yet it shall not be accounted injurious, unless it affect the public utility.²

§ 80. It has been held, in one case, that the river and all the profits of it may belong to one person, and the soil and ferry to another.³ And in a subsequent case, in Great Britain, it was held, that the soil of the river Thames is in the King, and the Mayor is conservator of the river, and it is common to all fishermen; and therefore there is no such contradiction betwixt the soil being in one, and yet the river common for all fishers.⁴

6. *User of Private Fisheries.*

§ 81. The owner of a fishery may lawfully use *nets*,

¹ Schultes, *ut supra*. And see ante, chap. ii. sec. 2; and *Melvin v. Whiting*, 7 Pick. R. 79; and *Gould v. James*, 6 Cowen, §69.

² Bract. lib. 4, chap. xlv.

³ *Inhabitants of Ipswich v. Browne*, Saville's R. case 48.

⁴ 1 Mod. R. 195; and see also Holt's R. 499. In like manner other territorial rights may exist by grant and constitution. Thus a prescription for sole and several pastures at all times, so as to exclude the lord of the soil from feeding, is good; although an entire exclusion, for all purposes, from the soil, is void; because such prescription does not exclude the lord of the profits, for he shall have mines, trees, and other things. Bac. Abr. 621. And a service to exclude the lord of the soil from depasturing his own cattle, may be made by specific contract, according to Bracton, (lib. 4, chap. vi. s. 1.)

as by setting a *seine*, for the purpose of taking fish;¹ but the nets must be such as will not injure the rights of other persons.² Upon most occasions, a man may use any nets, according to his pleasure, in his several fishery; but if he allow another to participate in his property, he cannot be justified in taking the fish with such engines as would leave no fish for his grantee, because the principle is *sic utere tuo ut alienum non lædas*.³ With respect to a common of fishery, in England, we are told, the user of nets must be regulated according to the custom of the manor. In some manors there, the net is employed at certain seasons, for the purpose of taking fish; and it would be clearly incompetent for some commoners to drag with instruments of a greater depth than customary, whilst their neighbors were content with the usual manner of obtaining the commonable profit.⁴

§ 82. In Massachusetts, the exercise of the right of several fishery in watercourses, is regulated by the government, and the right to regulate it has immemorially been granted to towns. Both in that State and in Maine, the rule of the Common Law, that fisheries in streams not navigable belong to the riparian owners, has been modified; it being deemed most conducive to the public good to subject the shad and alewife fisheries to public control, whenever the Legislature thought proper to interpose; and the paramount claims of the public have been implied in all grants made by

¹ Commonwealth v. Ruggles, 10 Mass. R. 391. Commonwealth v. Chapin, 5 Pick. R. 199.

² Ibid.

³ Woolrych on the Law of Waters, &c., 132.

⁴ Ibid.

them, and so in all conveyances by individuals.¹ The State of Massachusetts, in a grant of a tract of land, conveyed also the privilege of fishing, to be held in common among the grantees and other settlers. Afterwards the inhabitants of the territory granted, became a town, and they were authorized by law to appoint a committee to regulate the fishery within the town; and a penalty was imposed on any person, except such committee, or those authorized by them, who should take any fish. It was held, that the owner of the land adjoining the river was subject to the penalty, notwithstanding he, and those under whom he claimed, had used to take the fish there, before the grant made by the State.² The act of the Legislature of Massachusetts of 1807, granting the emoluments arising from the fisheries in the Damariscotta river in the towns of Newcastle and Nobleborough, in Maine, while a part of Massachusetts, and authorizing those towns to choose a committee with power to keep open a sluice or passage-way for the fish, and to go on and over any land or mill, whenever it should be necessary for the purposes of the acts, without being considered as trespassers, was held to be in no violation of the constitution.³ The legislative right of regulating fisheries, even over those which are private property, having been long exercised in Maine, before its separation from Massachusetts, the constitution of the former does not forbid the exercise of the right.⁴

¹ *Vinton v. Welsh*, 9 Pick. (Mass.) R. 87; *Cottrell v. Myrick*, 3 Fairf. (Me.) R. 222; *Commonwealth v. Chapin*, 5 Pick. (Mass.) R. 199; *Waters v. Lilly*, 4 Pick. (Mass.) R. 145; *Burnham v. Webster*, 5 Mass. R. 266.

² *Nickerson v. Brackett*, 10 Mass. R. 212.

³ *Cotterill v. Myrick*, 3 Fairf. (Me.) R. 222.

⁴ *Lunt v. Hunter*, 4 Shep. (Me.) R. 9; *Peables v. Hanneford*, 6 Ib.

§ 83. With respect to the quantity of fish which may by the Common Law be taken, it is clear, as will be seen by the first section of this chapter, that where the proprietor has an exclusive right, the number must be unrestricted; but if there be a special grant, by the proprietor, of a right to fish, the extent of such right will depend upon the terms of the grant.¹ As a general principle, the right cannot be so exercised as to injure a similar right belonging to another person. It is, says Mr. Woolrych, most consistent with the origin of the grant, that a commoner should take a reasonable supply only; because it is understood that such a common enures to the sustenance of his family, and that its produce may not be appropriated to any other purpose.²

7. *Obstruction of the Passage of Fish.*

§ 84. Even the exclusive right of fishery in rivers not navigable, is subject to a reasonable qualification, in order to protect the rights of others, who have a similar interest, but might lose all advantage from it, if their neighbors below them could with impunity wholly impede the passage of fish. The right of several fishery is clearly limited to the right of taking fish, and does not carry with it the right to hinder the passing of them above, and of preventing the supra-

106; *Fuller v. Spear*, 2 Ib. 417. But whether it is competent for the legislature to provide for the removal of natural obstructions, or for the erection of artificial facilities in the bed of a stream, for the ascent of fish, and the erection of a fishery, where they could not otherwise pass, without the consent of the riparian proprietor, and without making compensation — *quære*. *Cotterill v. Myrick*, *ub sup*.

¹ See *Ante*, § 79.

² *Woolrych, ut supra*.

riparian proprietors from enjoying a similar privilege. In Rolle's Abridgment, there is cited 17 E. 3, pl. 31, as an authority to show that assise may be maintained against an heir, an alienee, or feoffee, if any one of such refuse to amend the grievance of an obstruction to the privileges of a several fishery.¹ In the modern English case of *Weld v. Hornby*, in the Court of King's Bench,² it appeared, that the plaintiff being possessed of a sole and several fishery in a stream of water, undertook to convert a brush wear, through which some of the fish might and did escape, into a solid stone wear, which was entirely impervious. This was determined to be a nuisance, because it obstructed the passage of fish higher up the stream.

§ 85. This private right of fishery, in rivers above tide water, is, in this country, considered and held to be subject to the qualification of not being used so as to injure the private rights of others; so that it does not extend to impede the passage of fish up the river by means of dams or other obstructions.³ The above case of *Weld v. Hornby*, was recognized by the Supreme Court of Massachusetts, as being in conformity with the doctrine of the Common Law, which is thus laid down by PARKER, C. J. "It appears that this common-law right of several fishery in the owners of land bordering on streams not navigable, is subject to a reasonable qualification, in order to protect the right of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it,

¹ 2 Roll. Abr. 142.

² *Weld v. Hornby*, 7 East, R. 195.

³ 3 Kent, Comm. 411; *Boatwright v. Beekman*, 1 Rice (S. C.) Law R. 447; *Case v. Weber*, 2 Cart. (Ind.) R. 100.

if their neighbors below them on a stream or river might with impunity wholly impede the passage of fish into the lakes or ponds, where they by instinct repair for the multiplication of their species. This restriction is founded upon that universal principle of every just code of laws, *Sic utere tuo ut alienum non laedas.*"¹ And yet, (although large rivers, above tide water, like the Connecticut, extend through several States, and their banks are thickly settled, so that a great population is interested in the preservation of the fish which frequent the river,) "manufacturing machinery and steamboats, and the insatiable cupidity and skill of fishermen, have prodigiously diminished the resort of the most valuable fish into the rivers of the northern States."²

¹ Commonwealth v. Chapin, 5 Pick. (Mass.) R. 199.

² 3 Kent, Comm. 411, n. a. It appears by the case of Commonwealth v. Chapin, *ub. sup.*, that the Common Law in Massachusetts has been altered by successive legislative acts, from the earliest settlement of the country, as well under the colonial and provincial, as under the present form of government. And the rights of the citizens of the Commonwealth, as well as the penalties to which they may be subject, are to be determined by the effect, and according to the form of this legislation, rather than by the ancient Common Law. The Court proceed to say,—“By Prov. St. 8 Ann., c. iii., all persons are prohibited from placing in or across rivers or streams, any fixed implement or machine by which the free passage of fish may be obstructed. And by Prov. St. 15 Geo. II. c. vi., it is required of those who build dams across streams or rivers, to keep open, during a certain period, sluiceways or passages for the fish to pass through. These statutes assert the right of the public to regulate the mode of taking fish even in private or several fisheries, and they also, by implication, recognize the right of proprietors to erect dams and other works on rivers or their banks, provided a passage is left through them at certain portions of the year for the escape of the fish. By the St. 8 Ann. above cited, the erection of certain obstructions is declared to be a nuisance, and by a particular process, therein specified, such obstructions are to be abated; but those obstructions are not dams erected for permanent use, but hedges, wears, fishgarths, stakes, and kiddles, which, though not permanent, may

§ 86. It appears that statutes of States other than those of Massachusetts and Maine, evince an earnest solicitude in their Legislatures to preserve a free passage for fish in rivers; and more especially those which are annually visited by fish from the ocean.¹ In

occasion an entire interruption of the passage of fish; and there is a special exception of dams erected for the use of mills. But by St. 15 Geo. II. there is an implied grant or recognition of the rights of proprietors to erect and maintain dams, provided they secure a passage for the fish, by sluices, &c., during the season when they are accustomed to ascend the streams. This legislative provision, though altering, is not contrary to the Common Law, for by that the proprietors of banks might make such obstructions as were necessary to the taking of fish, leaving room enough for some of them to escape and ascend the streams. The statute only ascertains the mode in which this restriction shall be enforced, and provides the penalty for neglecting or violating it. But it is plain that the mere erecting or continuing a dam whereby fish may be obstructed, is no longer an offence, for that would be committed by any erection, however necessary for any profitable use of the fishery. The offence consists only in having a dam without providing a convenient passage for the fish during two or three months in the year; and the remedy, where this requisition is not observed, is totally different from that which exists at Common Law for a nuisance. Instead of abating a dam which is found to be deficient, the statute provides a pecuniary mulct, and gives power to certain municipal officers to supervise the public interests, and see to the execution of the law. It follows, we think, clearly, that an indictment, as at Common Law for a nuisance, cannot be maintained; but that if the dam should be continued without opening through it, at the proper season, a passageway for the fish, the proprietors will be subject to the penalty provided by statute."

See also the following decisions:—*Stoughton v. Baker*, 4 Mass. R. 522; *Burnham v. Webster*, 5 Mass. R. 266; *Nickerson v. Bracket*, 10 Mass. R. 212; *Commonwealth v. M'Curdy*, 5 Mass. R. 324; *Vinton v. Welsh*, 9 Pick. R. 87. For an act concerning the passage of fish in Mystic River, see *Hyde v. Russell*, 2 Cush. (Mass.) R. 251.

¹ An old act of Pennsylvania recites in its preamble that large quantities of fry or brood of fish, and young fish, are destroyed by dams, weirs, baskets, &c., in the rivers Delaware, and Schuylkill, and Susquehanna, whereby the great quantities of fish that were formerly to be taken in said rivers are greatly diminished; and then prescribes several penalties against persons who violate its provisions by such obstructions. See Hart

Hooker v. Cummings, SPENCER, C. J., says, that the Legislature of New York, "have confessedly the right of regulating the taking of fish in private rivers; and do, every year, pass laws for that purpose, as to rivers not navigable in any sense, and which are unquestionably private property."¹

§ 87. Causing a superfluity of water to drown or overflow a fishery, is a plain obstruction, and punishable by an action of trespass.² An action of trespass was maintained in Ireland, for wrongfully setting up certain wears and traps upon a certain fall of water, in

v. Hill, 1 Whart. (Penn.) R. 132. In New York the Revised Statutes regulate the right of fishery in rivers navigable and not navigable; particularly with regard to certain kinds of fish, and in the waters of the upper Hudson, jurisdiction of the subject is given to the courts of Common Pleas within their respective counties, in regard to streams, ponds, and lakes. 1 N. Y. Rev. St. 687, 688. In New York, also, salmon cannot be taken between October 20 and February 1; nor between these months, at or below the city of New York, between sunset on Saturday and sunrise on Monday; nor any net used between these hours; nor in the months of March, April, and May, a drift net, at the above places. Ib. In Virginia a dam shall not be built without an inquiry by jury as to the obstruction of fish. 2 Virg. Rev. St. 230, 311, 341. In South Carolina a statute requires the owners of existing dams to make slopes or openings for the passage of fish, the sufficiency of which is to be determined, as in Massachusetts, by commissioners. When a dam is built for the propelling of machinery, the owner may, at his election, leave sixty feet in width of the river open, or keep open a sluice in February, March, and April. S. C. St. 1827, p. 79. In North Carolina, in the *laying off* of rivers, the commissioners shall allow three fourths to the owner to erect stops, dams, and stands, and one quarter, including the deepest part, for the passage of fish. They shall also require a sufficient slope in mill dams. 1 N. C. Rev. St. 535, 536. In Alabama, where one erects a fish dam on a water-course, which is a public highway, he shall open in the deepest channel one third of the stream, including the main channel. Aik. Dig. 442. In Michigan the diversion from their natural course of *white* fish is forbidden. Mich. Laws, 475. See 2 Hill. Abr. 168, &c.

¹ Hooker v. Cummings, 20 Johns. (N. Y.) R. 90.

² 1 Ld. Raym. R. 274.

the river Bann, so that salmon, trout, and other fish, which would have come from the sea, and that part of the river which lay below the plaintiff's fishery, were hindered from so doing. A writ of error was then brought in the Exchequer Chamber, where the judgment was affirmed; and the case was then carried up to the House of Lords in Ireland, where the judgment was again affirmed.¹ The inquest taken upon a writ of *ad quod damnum*, in Kentucky, for flowing land by means of a dam, must ascertain whether or not fish would be obstructed; and in case they would be, permission to build the dam will be denied.²

§ 88. In *Shaw v. Crawford*, in New York,³ the Court say, (*obiter dictum*,) — “Every owner of a mill-dam or a stream which fish from the ocean annually visit, is bound to provide a convenient passage-way for the fish to ascend;” and they rely expressly on the case of *Stoughton v. Baker*, in Massachusetts.⁴ By that case, it appears that an ancient and long-continued usage of the General Court of Massachusetts, has been to appoint committees to locate and describe the site and dimensions of passage-ways for fish, and the owner of a mill holds it subject to the limitation that a reasonably sufficient passage-way shall be allowed for the fish. The Court, by PARSONS, C. J., say, — “If the government in its grant of a mill privilege, expressly, or by necessary implication, waive this limitation, it would be bound. But it would be an unreasonable

¹ *Hamilton v. Marquis of Donegal*, 8 Ridg. R. 267, and cited in Woolrych, 189, 190.

² *Eubank v. Pence*, 5 Litt. (Ken.) R. 338.

³ *Shaw v. Crawford*, 10 Johns. (N. Y.) R. 236.

⁴ *Stoughton v. Baker*, 4 Mass. R. 522.

construction of the grant, to admit that by it, all the people were deprived of a free fishery in the river above the dam, to which, until the grant, they were unquestionably entitled." Again, says the learned judge, — "The right to build dams for the use of mills, is, under certain implied limitations, acknowledged; one of these limitations is to protect the enjoyment of a fishery. Every owner of a mill, therefore, holds it subject to the limitation, that a sufficient and reasonable passage-way shall be left for the fish; and, as this limitation is a public benefit, it is not extinguished by any inattention or neglect in compelling the owner to comply with it."

§ 89. But it was decided by the Supreme Court of New York, in the year 1819, that a patent granted to one Z. P., in 1784, of a tract of land bounded on the east by Lake Champlain, and extending west on both sides of the river Saranac, seven miles square, the whole river to that distance, passed to the patentee; and that, as there was no reservation of the river, nor any restriction in the use of it, the public had no right of fishing in it, within the bounds of the patent; and that, therefore, the erection of a dam by the patentee in 1786, near the mouth of the river, by which salmon were prevented from passing up the river from the lake, was not indictable, as a public nuisance, either at Common Law, nor under the statute, for the preservation of fish in certain waters.¹ The statute, the Court

¹ Passed in 1800, and enacts, that the owners of mill dams made across any river running into Lakes Ontario, Erie, or Champlain, so as to prevent the usual course of salmon from going up, shall within eighteen months from the passage of the act, so alter the dam, by making a slope thereto, that salmon may easily pass up over into the waters above the

held, ought to be construed with an implied exception of such rivers or streams, (not being navigable,) as had been fully and absolutely granted by the State, without any reservation ; and that so far as it affected the rights of Z. P. and his assigns, it impaired the obligation of a contract, and was unconstitutional and void.¹ In this case the above case of *Stoughton v. Baker*, in Massachusetts, was strongly urged in favor of the plaintiffs, which the Court treated, by SPENCER, C. J., as follows :—“In that case, the Supreme Court of Massachusetts held, that a legislative resolution appointing a committee, who were authorized to require the proprietors of certain dams on Neponset River, to alter them, in such a way as should be sufficient for the passage of shad and alewives, at the dams, was a legal proceeding, not repugnant to the constitution. The opinion is founded on the ancient and long-continued usage of the General Court of Massachusetts, to appoint commissioners to locate and describe the site and dimensions of passage-ways for fish ; and, under the circumstances of the case, it was held, that the right of the proprietor of the dam was subject to the limitation that a reasonable and sufficient passage should be allowed for the fish. The Court, however, expressly say, that any prostration of the dam not within the limitation, would be an injury to the owner, for which he might appeal to his country, and have a remedy ; and that if the government, in the grant of a mill privilege, expressly, or by necessary implication,

dam ; or by removing the obstruction of such dam in any other manner ; and in case such dam shall not be so altered, &c., it shall be deemed a public nuisance.

¹ *People v. Platt*, 17 Johns. (N. Y.) R. 195.

waive this limitation, it would be bound. In the case then under consideration, the Court said, it would be an unreasonable construction of the grant to admit, that by it all the people were deprived of a free fishery in the river above the dam, to which, until the grant, they were unquestionably entitled. Whether, in that case, the Neponset River was navigable above the dam, is nowhere affirmed or denied ; but it is perfectly clear that the Court proceeded on local usages and customs, and not upon the general and received doctrines of the Common Law ; for not a single case is referred to, nor is it even asserted, that the principles advanced are sanctioned by the English Common Law ; whereas, it has been shown, that by the Common Law, the property in the river Saranac passed to Zephaniah Platt, and has been transmitted, through him, to the defendants, without any limitation or restriction, and that the fishery itself became vested in the proprietor of the river ; it being a conceded fact, that the river is unnavigable for boats of any kind ; for there is no weight in the circumstance that, for a few years past, and since 1810, rafts have occasionally been brought down this river, when connected with the fact that the defendant has received a consideration for that privilege. So far, then, from this being the exercise of a public right, it is a recognition of the defendant's property in the river, and fortifies and supports the defendant's claim to it, as private property. In a case thus circumstanced, the opinion of the Court in *Stoughton v. Baker*, would protect the defendant in the exclusive and undisturbed enjoyment of all the right acquired under the grant, for there is no reservation of the use, by the public, of the river, either for passage or fishing."

CHAPTER IV.

OF THE RIGHT OF USE OF THE WATER AS A CORPOREAL
HEREDITAMENT.

1. Of the General Right of Use.
2. Of the Injury by Diverting the Water.
3. Subterranean Diversion.
4. Of the Injury by Obstructing and Detaining the Water.
5. Of the Right of Irrigation.
6. Of the Effect of Prior Occupation, by a Riparian Proprietor.
7. Of the Injury by rendering the Water corrupt and unwholesome.

1. *Of the General Right of Use.*

§ 90. A WATERCOURSE may be either *natural* or *artificial*, and the right of the riparian proprietors to the water thereof, is, in the one case, a *corporeal*, and in the other, an *incorporeal* right. The right to the use of the flow of the water, in its natural course, and to the momentum of its fall on the land of the proprietor, is not what is called an easement, because it is inseparably connected with, and inherent in, the property in the land; it is a parcel of the inheritance, and passes with it.¹ In general, where a mill site is granted, that is land on a watercourse on which mills are actually situated, or where it appears by the grant, that the object is to erect mills thereon, the *soil* is the principal subject of the grant; and the right to use it for any and for all mill purposes, at the pleasure of the purchaser, and to change those uses, at pleasure, follows as incident to the ownership.² It is in accordance

¹ See Ante, Ch. I. § 5, *et seq.*

² *Ashley v. Pease*, 18 Pick. (Mass.) R. 268; *Embrey v. Haven*, 20 Law Journ. R. (N. S.) Exch. 212, 15 Jur. 633, & S. C. in 4 Eng. Law & Eq. R. 466.

both with common sense and legal interpretation, that, under a grant or a devise of a mill, the soil under it and adjacent thereto will pass by force of the word "mill;" and that the word should be deemed to include the site, dam, and other things annexed to the freehold, and necessary for its beneficial enjoyment.¹

§ 91. The following case has been put by a learned Judge: "Suppose a man owning land on both sides of a stream, (not navigable,) should grant to another the land on one side, bounded by the thread of the stream, and should, at the same time, grant a right to erect a mill on his own land, with a dam of sufficient height to raise the water to drive such mill. As such dam could not raise the water, without being extended across the river, and, of course, one half upon the grantor's own land, such a grant would, by necessary implication, carry the right to build on the grantor's own land, and to occupy it as far as necessary, to maintain the dam, so long as the dam should be kept up." The learned Judge considered it to be not a mere easement, but a *freehold*,² determinable upon the cessation of the mills, or as a demise, for the time the mills should continue; and that it carried with it a right of possession, for the violation of which an action of *trespass* would lie.³

¹ Whitney v. Olney, 3 Mason, (Cir. Co.) R. 280; Blaine's Lessee v. Chambers, 1 S. & Rawle, (Penn.) R. 169; New Ipswich Woollen Factory v. Batchelder, 3 N. Hamp. R. 190; Blake v. Clark, 6 Greenl. (Me.) R. 436. Grant of mill conveys the use of the water as a corporeal hereditament. Maddox v. Goddard, 3 Shep. (Me.) R. 218. It was not unusual in the early history of the country, to find mill privileges conveyed without any exact bounds, and such deeds have been held to convey so much *land* as was necessary and customarily used with the mill. Per Shepley, J., in the case just cited.

² See Ante, § 8.

³ Dryden v. Jepherson, 18 Pick. (Mass.) R. 392, per Shaw, C. J.

§ 92. If the owner of a large tract of land through which a watercourse passes, should convey parcels above and below his own land, each grantee would take his parcel with a full right, without special words to such effect, to the use of the flowing water on his own land, as parcel, and subject to the right of all other riparian proprietors to have the water flow to and from such parcel. There is, therefore, no occasion for the grantor in such case, to convey the right of water to the grantee, or reserve the right of water to himself, in express words ; because, being inseparable from the land, and parcel of the estate, such right passes with that which is conveyed, and remains with that which is retained.¹

§ 93. The uses to which the water of a watercourse may, and has been, applied, are various ; but the value of an estate is much enhanced by the existence thereon of what is called a "water privilege."² One of the most important uses of it in many parts of the United States, is its application to working of mills and machinery ; a use profitable to the owner, and vastly beneficial to the public.³ But both his benefit and that of the public would be diminished, just in proportion to the extent which other riparian owners above or below him may deprive him of the water, or use it

¹ See opinion of Shaw, C. J., in *Cary v. Daniels*, 8 Met. (Mass.) R. 466 ; *Hart v. Evans*, 8 Barr, (Penn.) R. 13. He who purchases land and a watercourse from another, is bound to look at the title before doing so ; for his right to dam the water, on investigation, may prove defective. *Beidelman v. Foulk*, 5 Watts, (Penn.) R. 308. See also *Randall v. Silverthorn*, 4 Barr, (Penn.) R. 173.

² See opinion of Lord Denman, in *Mason v. Hill*, 5 B. & Adol. R. 1.

³ See opinion of Shaw, C. J., in *Cary v. Daniels*, 8 Met. (Mass.) R. 466 ; *Blanchard v. Baker*, 8 Greenl. (Me.) R. 253.

to his annoyance, and contrary to the established rules of law; contrary to the doctrine which is clearly, though quaintly, stated, in the old books, in which it is said, "a watercourse begins *ex jure naturæ*, and having taken a certain course naturally, cannot be diverted." *Aqua currit et debet currere, ut currere solebat*, is also the language of the ancient Common Law.¹ That is, the water runs naturally, and should be permitted thus to run, so that all through whose land it runs may enjoy the privilege of using it. In 32 Ed. 3, fol. 8, an assize of nuisance was brought by A against B, for that B had made a trench over a river, and drew away thereby a part of the water and stream another way from that in which it did formerly use to run; and the assize passed for the plaintiff; and, it was adjudged, that the water should be removed into the ancient channel at the cost of the defendant.²

§ 94. By all the modern as well as by all the ancient authorities, the right of property in the water is *usufructuary*, and consists not so much of the fluid itself, as of the advantage of its *momentum* or *impetus*; ³ and the grant by the legislature of a State of the water

¹ Shury v. Pigott, Bulst. R. 339; S. C. Poph. R. 166; Countess of Rutland v. Bowler, Palm. R. 290.

² Callis on Sewers, 268. In the Year Book, 14 Hen. 8, 31, where an action on the case was brought for diverting a river, it is said by Row, "It seems that here he shall have assize of nuisance and not action on the case; as if you stop a conduit, I shall have assize of nuisance." Cited by one of the learned counsel in Acton v. Blundell, 12 Mees. & Welsb. Exchqr. R. 839. Palmes v. Heblethwaite, Skinn. R. 65, 175.

³ Williams v. Moreland, 2 B. & Cress. R. 510; Dickinson v. Grand Junction Canal Co., 16 Jur. 200, and S. C., 9 Eng. Law & Eq. R. 513. A riparian proprietor acquires no property in *wood* or *timber* floating over his land; but it has been held that he has an exclusive right to seize such wood or timber, and unless claimed within a reasonable time, to convert it to his own use. Rogers v. Judd, 5 Vermt. R. 223.

power of a navigable stream, does not pass to the grantee the title to the *corpus* of the water, or prevent its use by others.¹ The owner of the land merely transmits the water over the surface; he receives as much from his higher neighbor as he sends down to his neighbor below; he is neither better nor worse: the level of the water remains the same.²

§ 95. In a case in this country of much more than ordinary importance, and one universally and frequently appealed to as of high authority, the general doctrine in relation to the right to apply the water of a water-course, is thus laid down by Mr. Justice STORY:³ “*Prima facie*, every proprietor on each bank of a river is entitled to the land covered with water, to the middle thread of the stream, or, as is commonly expressed, *usque ad filum aquæ*. In virtue of this ownership, he has a right to the use of the water flowing over it, in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself;—but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another.” “This,” adds the same high authority, “is the necessary result of the perfect equality of right among all the proprietors of that which is common to all.” The general right of the riparian proprietors to the use of the water has been defined with ability and clear-

¹ Mayor, &c. v. Commissioners of Spring Garden, 7 Barr, (Penn.) R. 348.

² Per Tindal, C. J., in Acton v. Blundell, 12 M. & Welsb. R. 324.

³ In Tyler v. Wilkinson, 4 Mason's (Cir. C.) R. 400; and see the opinion of the same learned Judge in Webb v. Portland Manufact. Co.; 3 Sumn. (Cir. Co.) R.; and the case of Bowman's Devises v. Latham, 2 McLean, (Cir. Co.) R. 376.

ness by another of our learned Judges. "The water-power," says he, "to which the riparian owner is entitled, consists in the fall of the stream, when in its natural state, as it passes through his land, or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it."¹

¹ Per Chief Justice Gibson, of Pennsylvania, in *M'Calmont v. Whitaker*, 3 Rawle's (Penn.) R. 84; *Van Hoesen v. Coventry*, 10 Barb. (N. Y.) Sup. Co. R. 518; *Moffett v. Brewer*, 1 Greene, (Iowa) R. 348. It is laid down as the law of Scotland, that although a proprietor may use the water while within his own premises, yet he must allow it to pass on to the inferior heritors; and that he cannot alter its level, either where it enters, or where it leaves his property. (Bell's Law of Scot. 691.) No form of words could express with more exactness the law of England and of the United States upon the same subject, unless it be the one employed by Lord Ellenborough, viz. "Every man is entitled to a stream of water flowing through his land, without *diminution* or *alteration*. (*Bealy v. Shaw*, 6 East, 206.) We believe we may with safety state, that nearly all the cases concur in supporting the general proposition of Lord Ellenborough just mentioned. It is very fully sustained by the late case of *Wright v. Howard*, (Sim. & Stuart, 203,) and the still later case of *Mason v. Hill*, in Great Britain, (3 Barn. & Adol. 304, and 5 Ib. 1.)

A case in this country many years ago, recognized the same general principles. In *Beissell v. Scholl*, (4 Dallas's R. 211,) the action was a case for diverting a watercourse. The Court left the facts to the jury under this general statement of the law:—"That every man in this country has an unquestionable right to erect a mill upon his own land; and to use the water passing through the land, as he pleases; subject only to this limitation, that his mill must not be so constructed and employed as to injure his neighbor's mill; and that, after using the water, he returns the stream to its ancient channel." In the case of *Ingraham v. Hutchinson*, in Connecticut, (2 Conn. R. 584,) the late Chief Justice Swift, laid down the law as follows:—"By the Common Law, every person owning land on the banks of rivers, has a right to the use of the water in its natural stream, without diminution or alteration; that is, he has a right that it should flow *ubi currere solebat*; and if any person on the river above him, interrupts, or diverts, the course of the water to his prejudice, action will lie. This will give to every one all the advantage he can derive from the

§ 96. The Supreme Court of Alabama construe the Common Law, in relation to watercourses, as follows: "By the rules of the Common Law, all proprietors of lands have precisely the same rights to waters flowing through their domains, and one can never be permitted so to use the stream, as to injure or annoy those who are situated on the course of it, either above or below him. Should any one interpose an impediment to the flow of the stream to the injury of others, successive actions on the case would in the course of time compel its removal, or induce an accommodation of the injury."¹ The same view of the law is entertained by the Courts of North Carolina,² and of South Carolina.³

2. *Of the Injury by Diverting the Water.*

§ 97. Ever since the time of the Year Books, it has invariably been held, that it is illegal *to divert* a water-course, unless authorized or justified by the particular

water, which does not injure the proprietor of lands on the river below him." See also *Warring v. Martin*, Wright's Cond. (Ohio) R. 380; *Arnold v. Foot*, 12 Wend. (N. Y.) R. 330; *Frankum v. Earl of Falmouth*, 6 Car. & Payne, 529; and 25 Eng. Com. Law R. 526; *King v. Tiffany*, 9 Conn. R. 162; *Buddington v. Bradley*, 10 Conn. R. 213; *M'Almont v. Whitaker*, 3 Rawle's (Penn.) R. 84; *Shreve v. Voorhees*, 2 Green, (N. J.) Ch. R. 25. A riparian proprietor, who owns both banks of a stream, has a right to have the water flow in its natural current without any obstructions, over the whole extent of his land, unless his rights have been impaired by grant, license, or an adverse appropriation for twenty years. *Heath v. Williams*, 12 Shep. (Me.) R. 209.

¹ *Hendricks v. Johnston*, 6 Port. (Ala.) R. 472.

² *Pugh v. Wheeler*, 2 Dev. & Bat. (N. C.) R. 50.

³ The established doctrine in South Carolina is, that every owner of land through which a natural stream runs, has a right to the advantage of the stream as it was wont to flow, and to use it for any purpose of his own *not inconsistent* with a similar right of the owners below. The owner

circumstances of the case. The maxim of the law, which every riparian proprietor is bound to respect, as regards his right to the water, is *sic utere tuo ut alienum non lædas*.¹

§ 98. In an action on the case, in Illinois, for obstructing and diverting a watercourse, in which the plaintiff obtained a verdict, and judgment was rendered thereon, the defendant excepted to the instructions asked for and given, at the instance of the plaintiff. After the cause was brought to the Supreme Court, the parties agreed upon facts as having been proved at the trial, which were, that S. & B., in 1834, bought of T. C. six acres of land, through which a branch run, and erected a steam-mill thereon. They depended upon a *well* and upon the *branch* for water in running their engine. About one or two years afterwards, J. E. bought of T. C. six acres of land in the same branch above, and immediately adjoining the lot of S. & B., and erected

above cannot diminish the quantity of water which would otherwise descend, without grant or license. *Omelvaney v. Jaggars*, 2 Hill, (S. C.) R. 634; *Haynes v. Gratt*, 1 McCord, (S. C.) R. 543.

¹ Besides the authorities in the two or three preceding sections, see *Cottell v. Luttrell*, 4 Co. R. 36; *Stone v. Bromwich*, Yelv. R. 162; *Sands v. Trefusis*, Cro. Car. 573; *Brown v. Best*, 1 Wils. R. 174; *Merritt v. Parker*, 1 Coxe's (N. J.) R. 460; *Hart v. Evans*, 8 Barr, (Penn.) R. 13. Baron Alderson mentions a case of *Dakin v. Cornish* tried before him at Leeds, in 1845, where water was taken from the river Ayr to work a steam-engine. There was an artificial course from the river to a reservoir in the yard of a mill: the water was there mixed with other water obtained from the earth, the whole was then used for the steam-engine, what remained was transferred into another tube, and carried back to the river; and the question was whether this was injury to some other mills lower down the stream. He says, — "We took much pains about the case, and I left it to the jury to say if the same quantity of water continued to run in the river." *Embrey v. Owen*, 20 Law Journ. (N. S.) 212, & S. C. 4 Eng. Law & Eq. R. 466.

thereon a steam-mill, depending upon a *well and the branch* for water in running his engine. Ordinarily there was an abundance of water for both mills ; but in the fall of 1837, there being a drought, the branch failed, so far that it did not afford water sufficient to run the upper mill continually. One of the men employed by J. E. made a dam across the branch, just below J. E.'s mill, and thereby diverted all the water in the branch into J. E.'s well. After this diversion, the branch went dry below, and the mill below did not run in consequence of it more than one day in a week, and was then supplied with water from the well ; for which the suit was brought. The Court held that the diversion, according to all the cases, both English and American, was clearly illegal.¹

§ 99. In *Parker v. Griswold*, in Connecticut,² it appeared that the plaintiff owned land on a natural stream of water, and that the defendant owned land, with a mill thereon, on the opposite side, and bordered by it below the plaintiff's land ; and, that, under an authority obtained from the proprietors of the land on both sides of the stream above the plaintiff's land, the defendant erected a dam there, and cut a channel therefrom to his mill upon his land, through which a portion of the water was diverted from the stream, producing a considerable diminution thereof ; and that the water was not returned until it had passed the plaintiff's land. It was held, that the defendant could not justify such diversion, either by virtue of the authority derived from the proprietors above, or by virtue of his general rights as riparian proprietor below ; and that the plain-

¹ *Evans v. Merriwether*, 3 Scamm. (Ill.) R. 492.

² *Parker v. Griswold*, 17 Conn. R. 288.

tiff was not precluded from an action for such diversion, because he owned the land only on one side of the stream and not beyond its centre.

§ 99 *a*. The owners of a mill have not the right, when it becomes necessary for the purpose of repairs, to divert the stream upon which it is situated, to the injury of another proprietor upon the same stream below. If they cannot make their repairs without such injurious diversion of the stream, they must obtain the consent of the proprietor below them, for that purpose, or answer to him in damages for the injury he sustains. But if there has been merely a *detention* of the water, then the question arises whether such detention was reasonable.¹

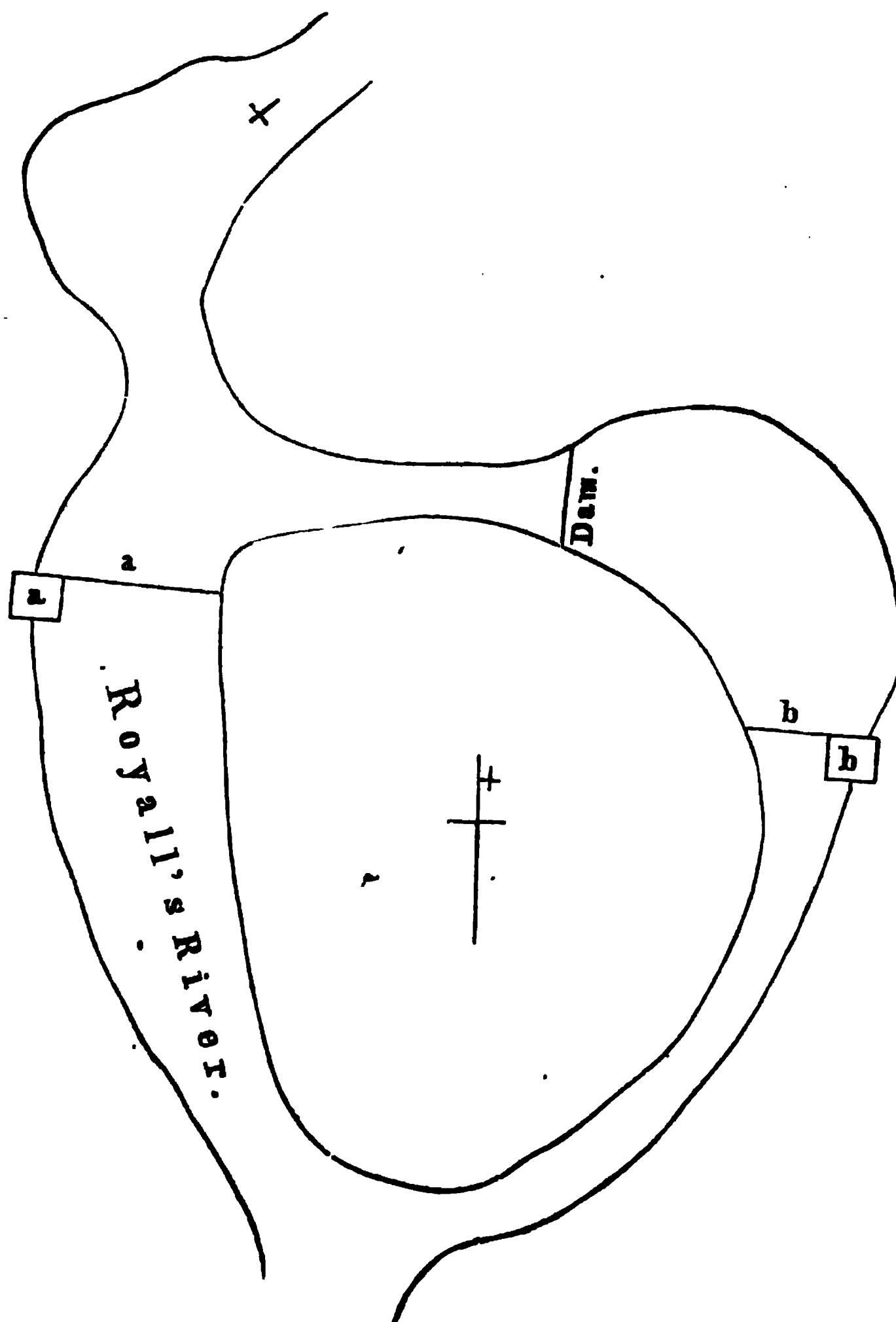
§ 100. Wherever a watercourse *divides two estates*, the riparian owner of neither can lawfully carry off any part of the water without the consent of the other opposite; and each riparian owner is entitled, not to half, or other proportion of the water, but to the whole bulk of the stream, undivided and indivisible, or *per my et per tout*. To use the language of PLATT, J., in *Vandenburg v. Vanbergen*, in New York,² — “The grant of an *undivided share* in a stream of water, would not authorize the grantee to appropriate or modify the stream to the injury of others who have a joint interest in it. The property in a stream of water is *indivisible*. The joint proprietors must use it as an entire stream in its natural channel; a severance would destroy the rights of all. In *Blanchard v. Baker*, in Maine,³ the defendants, who had their dam on the side of the stream opposite to the plaintiff’s dam, contended that

¹ *Hoesen v. Coventry*, 10 Barb. (N. Y.) Sup. Co. R. 518. As to *detaining* the water, see *post*, § 115.

² *Vandenburg v. Vanbergen*, 13 Johns. (N. Y.) R. 212.

³ *Blanchard v. Baker*, 8 Greenl. (Me.) R. 253.

they had a good and legal right to one half of the water in the main stream, and to carry it off by deepening an ancient outlet or canal. The following diagram shows the relative positions of the places alluded to in the testimony.



a a Plaintiff's mill and dam.

b b Defendant's mill and dam.

It was held that the defendants had not a right to one half of the water in the main stream of the river, so as to abstract it by means of the channel in question. The Court said, in reply to the suggestion, that the owners of the dam on the eastern side of the river, had a right to half the water, and *to divert to that extent*, — “It has been seen, that if they had been the owners on both sides, they had no right to divert the water, without again returning it to its original channel. Besides, it was impossible, in the nature of things, that they could take it from their side only ; an equal portion from the plaintiff’s side, must have been mingled with all that was diverted.”

§ 101. In a case in the Circuit Court of the United States, (first circuit,) ¹ it appeared that at certain falls on the river Presumpscut, in Maine, there were two successive falls, upon which there were erected certain mills and mill-dams, being called the upper and lower mill-dams, and the distance between them being about forty or fifty feet ; and the water therein constituted the mill-pond of the lower dam ; that the plaintiff was the owner in severalty of certain mills and mill privileges, upon the lower dam, and that the defendants were entitled to certain other mills and mill privileges on the *same dam*, also in severalty. The defendants were the owners of a cotton factory mill near the left bank of the river, and opened a canal for the supply of the water necessary to work that mill, into the pond immediately below the upper dam ; and the water thus withdrawn was returned again into the river immediately below the lower dam. The defendants insisted

¹ Webb v. Portland Manuf. Co., 3 Sumn. (Cir. Co.) R. 189.

upon their right so to divert and withdraw the water, by means of their canal, upon the ground, that it was only a small part (about one fourth) of the water, to which, as mill owners on the lower dam, they were entitled. It was held that both parties were entitled *per my et per tout*, to their proportions of the whole stream, on its arrival at the dam; and that neither party could divert any portion of it, though the portion diverted was a less quantity than he would naturally use at his mill on the dam; and that it was no answer to such a violation of right by one party, that the other had increased the quantity of water in the stream by means of a reservoir higher up.

§ 102. The water, a foot or more in depth, that runs over a dam, is not to be considered surplus water, and as of no value; for the head, and of course the water power, is thereby increased. And, if a right is granted by a riparian proprietor to abut a mill-dam on his land, extending from the opposite side of the river, the grantee has, *prima facie*, a right to all the water-power created by the erection of the dam; and the burden of proof is on the grantor to show that the grant was made with restrictions in respect to the use of the water by the grantee.¹

§ 103. It appeared on the trial, in *Curtis v. Jackson*, in Massachusetts,² that the water of Charles River between Newton and Needham, at the place where the plaintiff's mill was situated, was divided by a small island or rock, and that part of the water passed on the Needham side to a certain mill of the defendant;

¹ *Bliss v. Rice*, 17 Pick. (Mass.) R. 23.

² *Curtis v. Jackson*, 13 Mass. R. 507.

and the other part passed on the Newton side to the mill of the plaintiff, and to certain other mills on the same side of the river, there being but one dam for all the mills. On the Needham side there was a sand-bank above the defendant's mill; and the defendant having previously dug out a channel between that bank and the Needham shore, down to his mill, placed a dam or pile of stones from the upper end of the said bank to the Newton shore, so as to turn nearly all the water through the above-mentioned new channel to his own mill; and for this injury the action was brought. The defendant justified by endeavoring to prove a right by prescription of using the water of the stream in exclusion of all others, when there was not enough for the mills on both sides. But the Court held, that where there are mills on both sides of a watercourse, if the mill owner on one side has the exclusive right to use the whole of the water whenever there is not enough for the mills on both sides, he is not authorized to erect a permanent dam to turn the water to his mill; but that he must rely on his legal remedy if his right be infringed by the mill owners on the other side.

§ 104. In *Arthur v. Case*, in the Court of Chancery of New York,¹ it appeared that the complainants were the owners of certain mills and mill privileges on the *north* side of the outlet of Lake George; and that the defendants owned mills and mill privileges on the *south* side of the same stream or outlet. In the middle of the outlet there was an island, and the main current of the stream ran naturally on the *north* side of the island. A dam extended from the island to the *south*

¹ *Arthur v. Case*, 1 Paige, (N. Y.) Ch. R. 447.

shore on which the mills of the defendants were situate; and a similar dam ran from the island to the *north* shore by means of which the complainant's mills were supplied with water; but in dry seasons there was not water in the stream sufficient to supply all the mills. The defendants, claiming the right to have their mills first supplied, commenced building a dam from the island to strike the *north* shore some distance above the already established dam, the effect of which would be to deprive the mills of the complainants of water in dry seasons, and turn the whole stream to the *south* of the island. The complainants, having obtained an injunction to restrain the defendants from building this intended new dam, and, on coming in of the answer, a motion being made to dissolve the injunction, Chancellor WALWORTH held, that "where hydraulic works are erected on both banks of a private stream, if there is not sufficient water to afford a full supply for all, the owner on each side is entitled to an equal share of the water." Both parties, he said, were entitled to participate equally in the use of the water; and "if either party draws more than a fair proportion, or it is necessary to excavate in the bed of the river to give the defendants a due proportion, the manner of exercising the right, and the nature and extent of the excavation, must be settled under the direction of the Court, on the report of the master."

§ 105. It appeared in a case in New Hampshire, that a certain deed, under which the defendant claimed, purported to convey "the northerly half of the mill-dam" in dispute, and also the privilege of taking the water from any part of the said "northerly half of the mill-dam," for the use and benefit of the grantee and his heirs and assigns. Under this grant, the defendant

contended for a right totally to destroy the north half of the mill-dam, or to draw water from it for his uses in any quantities, in any manner, or at any period of time. The plaintiff, on the contrary, contended, that every thing which passed under the grant was a right to use the north half of the mill-dam for the purposes to which mill-dams are usually devoted, without the legal power either to remove it, or permit decays so as to injure the plaintiff's enjoyment of the other half of the mill-dam. It was held by the Court that the deed passed the right to the use of one half of the water only, and, therefore, that an action would lie against the grantee for taking more than one half the water to the injury of the grantor. Mr. J. WOODBURY observed, —“From the circumstances that when the deed was executed, the mills were situate on *the northerly half* of the dam, as well as on the south half, it is reasonable to presume that the *northerly half* was sold under an expectation it would be used to turn those mills, and not be altogether destroyed, or the gates removed so as to be tantamount to a total destruction of it for the purposes of a mill-dam for the mills situated on both halves.” RICHARDSON, C. J., construed the law to be, that “a conveyance of one half of a dam, is a conveyance of a right to use one half of the water; the parties own the dam neither as tenants in common, or as joint tenants, but each has all the title in his several part. Of the head of water raised by the dam, they are, however, tenants in common; and, in such case, if one draws the water unreasonably to the injury of the other, case may be maintained for the injury.¹

¹ *Runnels v. Bullen*, 2 N. Hamp. R. 532. Where two own severally several parts of the same dam, there is an implied contract or covenant

§ 106. In a case in Massachusetts,¹ it appeared, that the plaintiffs, "and those under whom they claim, owned a stone saw-mill on the east side of Williams River, and had made use of the dam for more than twenty years. The defendant owned a fulling-mill on the west side of the river. On the 11th of July, 1827, the defendant, after making a temporary dam, took away an old floom on the west bank, and dug the dirt away for the purpose of putting in a new floom. This weakened the temporary dam in such a manner that the water pressed through it and undermined it; and to prevent the water from doing damage, the defendant tore off the flash-boards and hoisted the waste-gate of the dam, east of the centre of the river. The effect of this was, to deprive the plaintiffs of the use of their stone saw-mill wholly for two or three days, and partially for ten weeks. On the part of the defendant it was contended, that he had a common right in the dam with the plaintiff; and that he was not liable for the injury. He proved that, twenty-two years previous to the alleged trespass, one Curtis, under whom he claims, with certain persons under whom the plaintiffs claim, built the dam, and that the plaintiffs and the defendant

between them, running with the land, that each shall keep in repair his portion of the dam, so long as he uses the water; and that as soon as one ceases to use the water, he shall permit the other to repair the whole. On that implied contract, the statute of New Hampshire of June 16, 1801, entitled "An Act relative to the repairs of Mills, &c.," is founded. Per Richardson, C. J., in *Runnels v. Bullen*, *ub. sup.* See *Lapham v. Curtis*, 5 Vermt. 371, in which it was held that it was the duty of each owner of a dam to use ordinary care and diligence in making repairs to it, so as to prevent injury being done to the other; and if he does not use ordinary care and diligence, he will be liable for all consequential damages to the other.

¹ *Boynton v. Rees*, 9 Pick. (Mass.) R. 528.

had repaired it together from time to time, and that, until the time of the trespass, the water privilege had been used in the following manner, viz., the preference in the use of the water had always been claimed by the proprietors of the stone saw-mill, except for the season of fulling cloth for customers, which was stated to be from the 1st of September to the 1st of March, during which period the owners of the fulling-mill claimed the preference for fulling cloth for customers. The defendant contended, that inasmuch as the injury happened to the plaintiffs when he was in the act of repairing his floom, he ought not to be charged with the damage sustained ; but the plaintiffs insisted, that between the 1st of March and the 1st of September in each year, they had a right to the full use of the water for carrying their mill, and that the defendant had no right, for the purpose of repairing his dam, to do any thing which should injure them in the full use of the water, and that if, from any attempt of the defendant to repair his floom, he had rendered it necessary, in order to prevent greater damage, to hoist their waste-gate and take off their flash-boards, he must be answerable in damages ; and that it was his duty, in making his repairs, to have taken such precautions as would have prevented any damage to the plaintiffs. WILDE, J., ruled, that the defendant had a right to make repairs upon his floom between the 1st of March and the 1st of September ; and that he was not answerable for the damage done to the plaintiffs in taking off their flash-boards and hoisting their waste-gate, provided the jury should be satisfied, that in making the excavation below the dam for the purpose of repairing his mill, he had used due and ordinary diligence ; and the question whether he had used such diligence was submitted to the jury."

To this opinion and direction the plaintiffs excepted; and the Court gave their opinion as follows:—“The parties were jointly liable to keep the dam in repair, nothing to the contrary appearing, and the floom contiguous to the mill of either was to be supported at his individual expense. It seems clear that this right to repair extends throughout the year. If there was a preference in the use of the water during part of the year, but not an exclusive right, then the defendant was entitled to the surplus water, and he had a right to repair on that account. But besides this, either party had not only a right to keep his floom in repair for his own use, but his duty required him to do so, in order to save the water for the use of the other party. The defendant, then, having had the right to make repairs, the question was, whether he used ordinary diligence. This question was submitted to the jury with instructions that were correct. If the defendant was bound to keep his floom in repair, he is not answerable for the accidental consequences of repairing, provided he was not guilty of negligence. If any accident happened which rendered extraordinary steps necessary in order to preserve the common property, as lifting the waste-gate or removing the flash-boards of the plaintiffs, he had a right to enter on the plaintiffs' land and perform these acts.”

§ 107. If two opposite riparian owners upon a water-course, by an agreement between them, erect mills on the land of one of them, and turn the whole stream to the mills; the water thus becomes appropriated to the mills; so that, if they be held jointly, or in common, a release of the right of one tenant in the mills, will pass his right in the water also.¹

¹ *Wetmore v. White*, 2 *Caines*, (N. Y. Ca. in Error,) 87.

§ 108. Of course, no riparian proprietor opposite to another, without a legal permission, can build a dam which extends beyond the *thread of the river*,¹ without committing a trespass; and, therefore, if, in removing such encroachment, the water is diverted, the law affords no redress. This was expressly held in *Wigford v. Gill*.² In that case, the action was trespass, and the facts were, J. S. erected a mill-dam, partly upon his own land, and partly upon the adjoining land; the owner of the adjoining land pulled down the part of the dam which was upon his land, by which the whole dam fell down, and consequently the whole water was discharged. The Court held, that the pulling down of the dam, under these circumstances, was entirely justifiable.

3. *Subterranean Diversion.*

§ 109. We now come to the consideration of the important question which has in several very modern cases been ably discussed, namely, *Whether in the case of two adjoining closes, upon one of which is a spring and watercourse issuing from it, the owner of the other close is liable for sinking a well in it, and thereby cutting off, or diminishing, the water of the spring?* In other words, *whether the same law applicable to the diversion of a watercourse running over the surface of the land, is applicable to springs under ground?* The propounding of such a question at once brings to mind the well-known maxim, that, in contemplation of law, land always extends *downwards* as well as upwards; so that whatever is in a direct line between the surface of any land and the

¹ See *Ante*, ch. 1, § 10.

² *Wigford v. Gill*, Cro. Eliz. 269.

centre of the earth, belongs to the owner of the surface. It would consequently seem to follow, that whether what is *subterranean* be solid rock, mines, or porous soil, or salt springs, or part land and part water, the person who owns the surface may dig therein and apply all that is there found to his own purposes *ad libitum*. The owner of the surface may, by excavating at the extremity, and under the surface of his own land, and so near a newly-built house that the house falls down; yet, although there is damage, no action is maintainable unless the house had been enjoyed for twenty years; but, if due caution is observed, it is *damnum absque injuria*. In these, and similar cases, there is undoubtedly a hardship upon the party injured to be without remedy.¹ But, by that consideration, Courts are not influenced; and as was said by ROLFE, J., in *Winterbottom v. Wright*,² "hard cases are apt to introduce bad law."³ But we proceed to what Courts of justice have said and adjudged upon the subject immediately under consideration.

§ 110. The defendants were the commissioners appointed, under an Act of Parliament, for paving, cleansing, &c., certain squares and streets in London, and were empowered to sink wells and erect pumps, for the purpose of watering those squares and streets. The plaintiffs were trustees, under the same act, for improving and regulating the use and enjoyment of the garden of Queen's Square, London, and repairing the *pump* and *well* in the square. The defendants, having begun to sink a well at the distance of twenty-three yards from

¹ See Broom's Legal Maxims, 150, 289.

² *Winterbottom v. Wright*, 10 M. & Welsb. R. 116.

³ See also *Walker v. Hatton*, 10 M. & Welsb. R. 259.

an old well and pump situate within and close to the iron railings, round the garden of Queen's Square, a bill was filed in 1840, alleging, that the old well and pump had always been repaired at the expense of the inhabitants of the square, who had at all times been in the habit of having the handle of it locked during the night, in order to prevent the water with which it was scantily supplied, being exhausted; and that the new well was intended to be sunk deeper than the old one, and would, when completed, draw off the water from it. The bill prayed for an injunction to restrain the defendants from further sinking their well, or doing any other act as tending to diminish the supply of water to the old well. The injunction having been granted *et parte*, the defendants moved to dissolve it. The Vice-Chancellor (Shadwell) said, that although his opinion was unfavorable to the right claimed by the plaintiffs, yet as the question whether they have that right or not was a legal one, he ought to restrain the defendants from doing the act complained of, until that question had been determined in a Court of law. He said, however, that there was no evidence at all, that the wells were supplied by a stream of flowing water, or in what other manner they were supplied. The counsel for the defendants contended that the owner of a pump cannot prevent his neighbor from erecting a pump on his land, because it may, *perhaps*, lessen the supply of water to the other pump.¹

§ 111. In *Dexter v. The Providence Aqueduct Company*, in the Circuit Court of the United States, for the first Circuit,² which was a bill in equity, the plaintiff

¹ *Hammond v. Hall*, 10 Simon, Ch. R. 552.

² *Dexter v. Providence Aqueduct Company*, 1 Story, (Cir. Co.) R. 387.

asserted himself to be the owner of a certain meadow, and that *for twenty years* and more, before December 1832, he and those under whom he claimed and derived his title, were in peaceable possession thereof, with all the rights and privileges of a certain *spring* and watercourse thereon situated, and passing and flowing upon and over, and extending and running through a part of the meadow, for the purpose of irrigation, and for drink for his cattle feeding therein; that the defendants, knowing the premises, in December, 1832, dug and sunk a deep well, fountain, and pit, in an adjacent close, and dug a trench therefrom, and laid and placed iron pipes leading from the well or fountain to the city of Providence; whereby they diverted the water from the said spring, and so diverted the natural flow of the spring and watercourse, that they were dry a considerable portion of the year, &c. Mr. J. STORY was clearly of opinion that *if the gravamen was made out by sufficient proof*, the plaintiff was entitled to relief under the bill. The case of *Balston v. Bensted*,¹ he held to be directly in point. The defence principally turned upon a denial of the *matter of fact*, that the spring and watercourse in question had been diverted at all, or, if diverted at all, that *it had been caused by the digging of the well and fountain and water pipes of the company*; and the company attributed the diminution of the water alleged, to other natural causes wholly independent of their well or fountain. In consideration of the contradictory nature of a great mass of testimony relating merely to the matter of fact, and dependent upon the credibility of witnesses, the Court proposed that the following questions should be submitted to a

¹ *Balston v. Bensted*, 1 Campb. R. 463.

jury to aid in the decision: — 1st. *Whether there was any such diversion of the water as that alleged?* 2d. If so, what damages have been sustained thereby? 3d. What is the permanent diminution or loss in value of the plaintiff's meadow land, occasioned thereby? The case of *Balston v. Bensted*, relied on by the Court, was tried at the Summer Assizes, 48 Geo. 3, 1808, and it was therein held by Lord Ellenborough, that the owner of a close cannot lawfully cut a drain, whereby the supply of water to the spring of an adjoining close, *after an enjoyment of it for twenty years*, is diminished. Lord Ellenborough held, early in the trial, that the only question was, whether the diminution of the supply of water *had been caused* by the drain dug by the defendant. The *causation*, (according to the reporter,) being clearly made out, it was agreed, upon the recommendation of the Court, that the water should be conveyed from the defendant's quarry to the plaintiff's works, in the manner that should be directed by an arbitration; and a juror was therefore withdrawn.

§ 112. In *Smith v. Adams*, in the Court of Chancery of New York,¹ it was held, that where a spring is supplied by a hidden stream passing through the earth, the owner of the land above where the water of the spring issues has no right to divert such water, by an excavation or artificial works upon his own land, to the injury of the riparian proprietors below, who are supplied by the waters of such spring *in their natural course*, or by prescriptive use. The complainant was the owner of a ten acre lot with a cloth-dressing establishment; and he was also the owner of another lot of

¹ *Smith v. Adams*, 6 Paige, (N. Y.) Ch. R. 435.

one acre adjoining the lands of the defendant, and separated from the ten acre lot by a turnpike road. Upon the one acre lot, and only a few feet below the defendant's line, there issued out of the slate rock, from the direction of the defendant's land, a perennial spring; the waters of which, when flowing in their natural course, ran across the one acre lot, and thence through the defendant's lands situated lower down, into a creek which ran through the ten acre lot, at a point below the complainant's ten acre lot. In 1804, the then owner of the two lots belonging to the complainant, laid an aqueduct of logs, from the spring, across the turnpike, to the ten acre lot, for the purpose of carrying water to a distillery which was then in operation there. By this aqueduct the greatest portion of the water of the spring was diverted from its natural course over the defendant's lands below the spring lot, and was discharged upon the ten acre lot. This change of the natural course of the water had continued by means of the aqueduct, and the waters thus diverted had been used for different purposes upon the ten acre lot, down to the time of filing of complainant's bill, in 1831. The whole water thus diverted was seldom actually used by the complainant and those under whom he claimed, but a very considerable portion thereof had been suffered to run to waste. The defendant and his father, from whom he derived title to his lands above and below the spring, had for more than thirty years been in the habit of resorting to the spring and taking water therefrom for cattle and for domestic purposes. In 1825, the defendant laid an aqueduct of logs from the spring to his house, and thereby conveyed a small portion of the water in that direction for the use of his family, &c.; and he continued to use the water in that man-

ner without objection or molestation for about five years. In 1830, for some unexplained cause, that part of the defendant's aqueduct which was continued for a short distance in the soil of the complainant's lot, to reach the spring, was torn up and destroyed by the plaintiff's direction. The defendant being thus deprived of the power of using a portion of the water in this way, *dug down upon his own land, a short distance above the spring, until he struck the subterranean stream*; and from this point he laid a new aqueduct to his house. The Vice-Chancellor, upon the hearing before him, decided, that the complainant had established a prescriptive right to divert so much of the water of the spring as would pass through an aqueduct of one and a quarter inch in diameter, and to use the same at his discretion; and to have the whole of the residue of the waters to pass over his spring lot *in their natural course*. He, therefore, decreed accordingly, and granted a perpetual injunction to restrain the defendant from diverting any portion of the waters which supplied the spring, from their natural channel. From this decree the defendant appealed to the Chancellor, who concurred with the Vice-Chancellor in the conclusion that the evidence established a prescriptive right in the complainant to divert a portion of the waters of the spring across the defendant's land; but as to the *subterranean diversion*, he said, — "It is necessary then to examine whether the diverting the water found in the earth, in the defendant's own land, to the extent to which the water has been diverted by Adams in this case, entitles the complainant to the extraordinary remedy of a perpetual injunction under a decree of this Court; upon principle, I think the rights of the parties must be the same whether the spring issues from the earth upon

the land of Adams, or after passing under ground through his land, first makes its appearance upon the surface of the earth upon the lot of Smith, a little farther down. *The only difficulty presented in the latter case is to establish the fact that the water diverted is the same which, in its natural course, issued upon and flowed across the lands below.* And such was the decision of Lord Ellenborough in *Balston v. Bensted*.¹ Here the fact is clearly established, that the stream of water of half an inch in diameter, which the defendant has diverted to his house by means of the aqueduct upon his own land, is a part of the larger stream which naturally issued from the earth upon the spring lot below. The law being well settled, that the owner of the superior heritage has no right to detain or divert the water which passes through his land, to the injury of those who were accustomed to receive it upon their lands below, there can be no reasonable doubt of the complainant's right to sustain an action, in the appropriate tribunal, for this abstraction of a part of the water of the spring, if he has in fact sustained any damage either directly, or by the prospective diminution of the value of the spring lot."

§ 113. In *Greenleaf v. Francis*, in the Supreme Court of Massachusetts,² it was held, that in the absence of all rights acquired by grant or adverse user for twenty years, the owner of land may dig a well on any part of it, notwithstanding he thereby diminishes the water in his neighbor's well; unless, in so doing, he is actuated by a mere malicious intent. It appeared that the plaintiff's cellar was dug fourteen years before, and

¹ Cited in the preceding section.

² *Greenleaf v. Francis*, 18 Pick. Mass. R. 117.

water was then found, and in about two years afterwards, an excavation was made in the earth, in the place where the well then stood, about three feet deep, and a barrel was inserted, and the water rose to the surface. Afterwards the defendant dug in his own soil to obtain water, and in a place where it was convenient for him, but near to the well of the plaintiff; and afterwards the water ceased to flow into the plaintiff's well so copiously as it before did. PUTNAM, J., who delivered the judgment of the Court, after stating the case, said,—"Then it is to be considered, whether the plaintiff has proved any such easement, as she claims to have in the soil of the defendant. She does not pretend that there has been any written grant from the defendant. She relies upon the use, as evidence from which a jury should presume a grant; and there is no other circumstance to be relied upon. But, by our law, the right of the plaintiff to control the operations of the defendant on his own soil must, in the absence of a written agreement, be made out by an adverse possession continued peaceably under a claim of right for twenty years at the least. In the present case such proof is wanting. There is not evidence of any adverse use or possession at all. For the defendant had no means of knowing that the plaintiff's well was supplied by springs in the defendant's soil, until the defendant dug for water there for his own use. He sustained no injury by the use which the plaintiff made of the water she found in her own well; and the use, if it had been adverse, has not been continued for twenty years. Indeed, there is nothing in the case at bar which limits or restrains the owners of these estates, severally, from having the absolute dominion of the soil, extending upwards and below the surface so

far as each pleases ; each, however, by the law, being held so to operate below the surface as not to cause the soil to fall in from the adjoining estate. These rights should not be exercised from mere malice ; and so the judge ruled at the trial. But the proprietor, in the absence of any agreement subjecting his estate to another, may consult his own convenience in his operations above or below the surface of his ground. He may obstruct the light and air above, and cut off the springs of water below the surface. The proprietor must, at his peril, so place his house and make his excavations below it, as to obtain water, air, and light, even if his neighbor should exercise his full rights of dominion upon his adjoining estate. Now the case finds, that the defendant dug his well in that part of his own ground where it would be most convenient for him. It was a lawful act, and although it may have been prejudicial to the plaintiff, it is *damnum absque injuria*."

§ 114. A very important case upon the subject of subterranean diversion, and one which was considered by the Court by which it was decided, equally novel, is that of *Acton v. Bell*, in the English Exchequer Chamber, in 1843.¹ The plaintiff below, who was also the plaintiff in error, in his action on the case, declared in the first count for the disturbance of his right to the water of certain *under-ground springs, streams, and watercourses*, which, as he alleged, ought of right to run and percolate into the closes of the plaintiff, for supplying certain mills with water ; and in the second count, for the draining off the water of

¹ *Acton v. Bell*, 12 M. & Welsb. R. 324.

a certain *spring* or *well of water* in a certain close of the plaintiff, by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit, and enjoyment of the water of the said *spring* or *well* for the convenient use of his close. The defendants, by their pleas, traversed the rights in the manner alleged in each count. At the trial, it was proved by the plaintiff, that, within twenty years before the commencement of the suit, namely, in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of his mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants at about three quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinking was, that, by the first, the supply of water was considerably diminished, and by the second, was rendered altogether insufficient for the purposes of the mill. The learned Judge, before whom the cause was tried, directed the jury, that if the defendants had proceeded and acted in the usual and proper manner on the land, for the purpose of working and winning a coal-mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration as traversed by the second and third pleas. Against this direction of the Judge the counsel for the plaintiff tendered a bill of exceptions. Upon the argument of the bill of exceptions, on a consideration of the case, in the Exchequer Chamber, it was held that the learned Judge was correct in point of law. The question argued was in substance this: *whether*

the right to the enjoyment of an under-ground spring, or of a well supplied by such under-ground spring, is governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface. The judgment of the Exchequer Chamber, was delivered by TINDAL, C. J., who said,—“In the case of the running stream, the owner of the soil merely transmits the water over its surface ; he receives as much from his higher neighbor as he sends down to his neighbor below ; he is neither better nor worse ; the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil ; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor, he may impose on such neighbor the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle ; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined ; in the present

case, the nearest coal-pit is at the distance of half a mile from the well; it is obvious the law must equally apply if there is an interval of many miles. Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both, would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith. No case has been cited on either side bearing directly on the subject in dispute. The case of *Cooper v. Barber*,¹ which approaches the nearest to it, seems to make against the proposition contended for by the plaintiff. In that case the defendant had for many years penned back a stream for the purpose of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land; but as this percolation had been insensible, and unknown by the plaintiff until the land was applied for building purposes, the Court held, that the defendant had gained no right thereby, so as to justify its continuance. The case of *Patridge v. Scott*, 3 M. & W. 230, is an authority to show, that a man, by building a house on the extremity of his own land, does not thereby acquire any right of easement, for support or otherwise over the land of his neighbor. It is said in that case, 'he has no right to load his own soil, so as to make it require the support

¹ *Cooper v. Barber*, 5 Taunt. R. 99.

of that of his neighbor, unless he has some grant to that effect.' It must follow, by parity of reason, that if he digs a well in his own land so close to the soil of his neighbor, as to require the support of a rib of clay or of stone in his neighbor's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties, if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary; which is, in substance, the very case before us. The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe. The authority of one, at least, of the learned Roman lawyers appears decisive upon the point in favor of the defendants; of some others, the opinion is expressed with more obscurity. In the Digest, lib. 39, tit. 3, *De æquâ et aquæ pluvie arcandæ*, § 12, '*Denique Marcellus scribit, Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi: nec de dolo actionem, et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit.*' It is scarcely necessary to say, that we intimate no opinion whatever as to what might be the rule of law,

if there had been an uninterrupted user of the right for more than the last twenty years ; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface ; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water ; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure ; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action. We think, therefore, the direction given by the learned Judge at the trial was correct, and that the judgment already given for the defendants in the Court below must be affirmed."

§ 114 *a*. The above case of *Acton v. Blundell* is distinguishable from that of *Dickinson v. Grand Junction Canal Company*,¹ afterwards decided. In the latter case it was held, that where water is taken from a river after it has formed part of its stream, not by the rea-

¹ *Dickinson v. Grand Junction Canal Co.* 16 Jur. 200, and S. C. 9 Eng. Law & Eq. R. 513. *Quære*, if the party digging the well was ignorant, and could not by any degree of care have ascertained, before making the well, that it would have the effect of abstracting the water, and when he discovered that it did, could not have repaired the mischief, an action would be maintainable ?

sonable use of it by another riparian proprietor, but by the digging of a well, an action at common law will lie by a riparian proprietor for injury to his right, against the party digging the well; as it also may for the abstraction of water which never did form part of the river, but has been prevented from doing so in its natural course by the excavation of the well; and this whether the water was part of an underground watercourse, or percolated through the strata. By PARKE, Baron,—"When water is on the surface, the right of the owner of the adjoining land to the *usufruct* of that water is not a doubtful matter of fact—it is public and notorious—and such a right, as a matter of course, is to be respected by every one; and indeed, if the course of a subterranean stream were well known—as is the case of many which sink under ground, pursue for a short space a subterranean course, and then emerge again—it never could be contended that the owner of the soil under which the stream flowed, could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground. When, however, the springs come to the surface, and form streams and rivers, the established rules apply, that each riparian owner is entitled, not to the property in the flowing water, but the *usufruct* of its stream, for all reasonable purposes—to drink, water his cattle, or to turn his mills, according to the nature and situation of the stream."

4. *Of the Injury by Obstructing and Detaining the Water.*

§ 115. An action for the diversion of a watercourse, is grounded on the *deprivation* of the water; and hence,

if the party complaining is deprived of the water by any other means, the law will interpose. It is as illegal to *detain* the water unreasonably, as it is to *divert* it; for though all persons have an equal right to erect hydraulic works on their own land, yet they must so construct them, and so use the water, that all persons below may participate, without interruption, in the enjoyment of the same water.¹ A mill-owner, for in-

¹ If a body of water runs out of my pond into another's, I have no right to reclaim it. (2 Bla. Com. 18.) See also *Arnold v. Foot*, 12 Wend. (N. Y.) R. 330; *Howell v. McCoy*, 3 Rawle's (Penn.) R. 256; *Hoy v. Sterret*, 2 Watt's (Penn.) R. 327; *Twiss v. Baldwin*, 9 Conn. R. 291; *Van Hoesen v. Coventry*, 10 Barb. (N. Y.) Sup. Ct. R. 518. In *Sackrider v. Beers*, (10 Johns. R. 241,) the opinion of the Court was as follows:—"There is no just objection to the recovery of the plaintiffs below. The defendants were answerable in damages for the injury to the plaintiffs in the enjoyment of their mill, by diverting the natural course of the water. The defendants had, no doubt, a right to build a mill on their land; but they must so construct the dam, and so use the water, as not to injure their neighbors below in the enjoyment of the same water, according to its natural course." In *Shears v. Wood*, 7 Moore, R. 534, the plaintiffs were owners of copper-mills, and the defendant owner of a silk-mill on the same river, but considerably higher up. The latter caused a dam to be erected, which prevented the water from being supplied as usual to the lower mills. The Court said,— "It was in fact stated in the declaration, that the water did not run to the plaintiff's mills as they were accustomed to have it. That is sufficient to show, that it did not come to them at the proper and usual times, or as it ought to have done; and it was proved, that it did not come to their mills in a sufficient quantity, as it formerly used to do. That fact was sufficient to support the plaintiff's declaration." See *Williams v. Morland*, 2 B. & Cress. R. 910. Sea-water may occasionally, by some changes proceeding from natural and unknown causes, make gradual inroads on parts of a coast which had been free from its waters for centuries. On such occurrences, it has been justly compared to a common enemy, against which every man may defend himself as he can; but this is different from an occasional course of superabundant inland water flowing in the same direction whenever the occasion happens, and the ordinary channel has become insufficient to carry it off. In the one case, if the works of a riparian proprietor to defend his banks be successful, the water is prevented from coming where, within time of memory

stance, who shuts down his gate, and detains the water for an unreasonable time, and thus deprives others of a fair participation of the benefits of the stream, is answerable in damages.¹ If the owner of an upper site on a watercourse has obstructed the flowing of the water as accustomed to flow, to the injury of an owner below, it is no defence to an action for the obstruction, that the latter has altered his works so as to require more water than was previously needed, and by this means alone the obstruction becomes more injurious to him.²

§ 116. But many cases may be supposed where there may be a trivial and temporary diminution of the water, by detention, without amounting to an actionable injury. Property in a watercourse, as we have shown, consists in a right to its use ; and as it cannot be used in the most beneficial manner, (and not at all for hydraulic works,) without raising a head of water, there must be incident to the privilege of use, a right to erect a dam, and detain the water long enough to use it to advantage.³ It was laid down by Ch. J. KENT, that neither the occasional increase of the velocity of the current, and of the *quantum* of water below, nor the insensible evaporation and decrease of water by dams, will amount to an actionable injury. To adopt his own

at least, it never had come ; in the other, it is prevented from passing in the way, in which, when the occasion happened, it had been accustomed to pass, and is illegal. *Rex v. Trafford*, 1 B. & Adol. R. 874 ; S. C. 20 Eng. Com. Law R. 498.

¹ *Merritt et al. v. Brinkerhoff et al.*, 17 Johns. R. 306.

² *Johnson v. Lewis*, 13 Conn. R. 303.

³ A mere theoretical injury to a mill, occasioned by another mill on the same stream, affords no ground for an action. *Thompson v. Crocker*, 9 Pick. R. 59 ; and see *Boynton v. Rees*, Ib. 528.

language, — “Many such circumstances may be inevitable from the establishment of one dam above another upon the stream; the question in such cases would turn upon the *nature and extent* of the injury.”¹ As a general rule, the law, as a practical science, cannot take notice of “melting lines, nice discriminations, and evanescent quantities.”² In this view, the increased evaporation of water produced by the exposure of a larger surface, by means of the erection of a dam, would not be a *deprivation* of the water in the technical sense in which it is used as denoting a *diversion*; though in a loose and theoretical sense it might be.³

§ 117. Upon the subject of the unavoidable inconvenience occasioned by a fair and reasonable use of the water, Mr. J. STORY, in giving the opinion of the Court, in *Tyler v. Wilkinson*, observed as follows: — “I do not mean to be understood, as holding the doctrine, that there can be no diminution whatever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation, or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent

¹ *Palmer et al. v. Mulligan et al.*, 3 Caine's (N. Y.) R. 307. See *ante*, 99 a.

² *Jones on Bailm.* 9.

³ See the opinion of Storrs, J., in *Wadsworth v. Tillotson*, 15 Conn. R. 366.

with the use of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common use, nor into an extravagant looseness which would destroy private rights.”¹

§ 118. The following opinion, on the same nice point, was given by the Supreme Court of New York, and delivered by WORDSWORTH, J. — “The common use of the water of a stream, by persons having mills above, is frequently, if not generally, attended with damage and loss to the mills below ; but that is incident to that common use, and for the most part, unavoidable. If the injury is trivial, the law will not afford redress ; because every person who builds a mill, does it subject to this contingency. The person owning an upper mill on the same stream, has a lawful right to use the water, and may apply it in order to work his mills to the best advantage, subject, however, to this limitation, that if in the exercise of this right, and in consequence of it, the mills lower down the stream are rendered useless and unproductive, the law, in that case, will interpose and limit this common right, so that the owners of the lower mills shall enjoy a fair participation ; and if, thereby, the owners of the upper mill sustain a partial loss of business and profits, they cannot justly complain, for this rule requires of them no more than to conform to the principle on which their right is founded. It can-

¹ Tyler et al. v. Wilkinson et al., 4 Mason's R. 401.

not then be admitted, that the defendants may use the water as they please, because they have a right to a common use, although their works may require all the water, in order to derive the greatest profit. The plaintiff's rights must be regarded; they must participate in the benefits of the stream, to a reasonable extent, although the defendant's profits may be thereby lessened. If the defendants insist on the unrestricted use of the water, and appropriate it accordingly, and this proves destructive to the mills below, the law, in that case, allows the party injured a compensation in damages, to the extent that, under all the circumstances, shall be considered an equivalent. In that event, the plaintiffs receive no more than they would have realized by their business, had the defendants permitted the water to flow in a reasonable manner."¹

§ 119. The reasonableness of the detention, by a riparian proprietor, *above*, to the injury of a riparian proprietor below, depends much upon the *nature* and *size* of the stream, as well as the employment to which it is subservient. In an action on the case in Pennsylvania, the plaintiff alleged, that the defendant obstructed and retained the water of a certain stream that flowed through his land, so as to deprive him (the plaintiff) of the use of the water for the purpose of driving his grist-mill. It appeared, that the plaintiff was the owner of a tract of land through which the stream run, and upon which his grist-mill was; that the defendant was the owner of land above, on the same stream, on which he built a saw-mill, and made a dam across the stream, for the purpose of conducting the water to his saw-mill.

¹ Merritt et al. v. Brinkerhoff et al., 17 Johns. (N. Y.) R. 306.

The plaintiff gave in evidence, that the defendant withheld the water three, four, and five days, and at one time thirteen days ; that at times he discharged the water in such quantities as to flood the plaintiff's mill ; that when the water was detained in the defendant's dam eight days and longer, it got no higher than when detained three days ; that the water sank away in a dam, or dried up when detained so long, as the breast of the dam did not leak ; and that the defendant had said that if he let the water run, it would cause his fore-bay to leak. The defendant, on the other hand, gave evidence to show that when he detained the water, the stream was low, and the season very dry, and that without the detention he could not saw at his mill ; that he only used the water for his saw-mill, and for the purpose of watering his meadow ; that the water was turned in to its natural course before it left his premises ; that the stream was a *small one*, and insufficient for both mills ; that his dam was a clay bottom, and that the water could not well sink away ; that the breast of his dam did leak, and that there were two springs in the dam. In his charge to the jury, the Judge said, — "The defendant had a right to use the water as it passed through his land. If he detained it no longer than was necessary for his proper enjoyment of it, the plaintiff cannot recover ; whether, if you believe from the evidence that he did detain the water three days, at times, at other times five days, and at one time thirteen days, in his own dam, to the injury of the plaintiff's mill, this was longer than was necessary for the defendant's proper enjoyment of the water, at his mill, as it passed through his land, is left to your determination. If you believe it was, you will find for the plaintiff. If you believe it was not, you will find

for the defendant, unless you believe that the defendant 'did vexatiously, or wantonly detain the water, or that there was some degree of malevolence in the time, or quantity of water discharged, to the injury of the plaintiff's mill ; for, if you believe this, your verdict should be for the plaintiff." This charge was objected to ; and it was contended, that the Court ought not to have submitted the question of *time* to the jury ; that 'the *time* the water was detained, under the circumstances of the case, was so *long* and *unreasonable* as entitled the plaintiff to recover ; and *Per Curiam*, — "The law of the case is so fully and accurately laid down in the charge, that scarce any thing can be added to it. The reasonableness of the detention, depending as it must, on the nature and size of the stream, as well as the business to which it is subservient, and on the ever-varying circumstances of each particular case, must necessarily be determined by the jury, and not by the Court. It is not many years since the reasonableness of notice of the dishonor of a bill or note, though reducible to rule, was determinable in the same way. But it is impossible to make even a general rule for cases like the present ; and the matter was fairly submitted, therefore, to the jury."¹

5. *Of the Right of Irrigation.*

§ 120. The cases in England in which the contro-

¹ *Hetrich v. Deachler*, 6 Barr, (Penn.) R. 32. And to the same effect, *Hay v. Sterrett*, 2 Watta, (Penn.) R. 327 ; *Hartzall v. Sill*, 2 Jones, (Penn.) R. 248. See also *Embrey v. Owen*, *post*, in note to § 129 ; *Miller v. Miller*, 9 Barr, (Penn.) R. 74 ; *Newhall v. Greson*, Sup. Ct. of Mass. Essex, Nov. Term 1852 — Law Rep. for Jan. 1853 ; *Morris Canal and Banking Co. v. Society, &c.*, 1 Halst. (N. J.) Ch. R. 203.

versy has been in respect to the abstraction of water from a watercourse for the purpose of fertilizing land, are few and generally those in which a right so to abstract it, has been claimed on the ground of grant or prescription; but they nevertheless imply, that, as a general rule, the water cannot be so abstracted to the material diminution of the quantity of water which naturally runs in the watercourse.¹ But a case is mentioned in a late English publication,² of an action brought for the disturbance of a watercourse, where it appeared that the water, after being used for irrigation, was returned to the natural channel; and Wood, B., nonsuited the plaintiff: as, however, it was shown that a portion of the water *was lost*, by irrigation and absorption, the Court of King's Bench set aside the nonsuit. The judgment of the King's Bench, in this case, coincides with the law of France, by which, although a riparian proprietor on a brook or river, may divert the water for his meadows, "yet every one must use this liberty so as to do no injustice to his neighbors, who have a like want and an equal right."³

§ 121. It is very easy to be perceived that judicial tribunals in this country, in a number of instances, in expounding the law of watercourses, and in adjusting the conflicting claims of riparian owners, have had in their minds a distinction between one kind of use of water and another; one of which may be called a use for *natural* purposes, and the other for *artificial* purposes.⁴ A distinction of this sort was, for the first

¹ See *Greenslade v. Haliday*, 6 Bing. R. 379; *Strutt v. Bovington*, 5 Esp. R. 56; *Hall v. Swift*, 6 Scott, R. 167.

² Gale & What. on Easements, 284.

³ Domat, Pub. Law, 1, 8, 2, 11.

⁴ See the opinion of Gibson, C. J., in *Mayor, &c., v. Comm. Spring Gar-*

time, it is believed, expressly laid down in a case before the Supreme Court of Illinois;¹ an entire account of which will be given before the consideration of this branch of the subject of the right to the use of a natural watercourse is concluded. The wants of riparian proprietors on a watercourse, in the opinion of the Supreme Court of Illinois, as expressly declared, may be thus summarily stated. They are either *natural* or *artificial*; *natural* are such as are absolutely necessary to be supplied, such as *thirst* of people and of cattle, and *household purposes*; and, in *arid* climates, water for *irrigation* is referred to the class of *natural* wants, to which *artificial* wants must ever be legally subservient. So that, whether the want of water for the purpose of irrigation, be a *natural* or an *artificial* want, is dependent upon circumstances. It may be the one or the other. If the want of water is simply for the comfort or convenience or prosperity of a riparian proprietor, it is *artificial*; and under this head is referred the demand for water for manufacturing purposes and for hydraulic purposes in general. These discriminating suggestions are offered *in limine* to prepare the reader for the authorities now to be laid before him.

§ 122. It was decided many years ago in Connecticut, that a riparian proprietor may take advantage of a stream of water running through his land to fertilize his meadows; provided, he does not deprive the adjoining proprietor, below, of a sufficiency of water for

den, 7 Barr, (Penn.) R. 328; Pugh v. Wheeler, 2 Dev. & Bat. (N. C.) R. 50. "The waters made him great, and the deep set him up on high with her rivers running round about his plants, and sent out her little rivers unto all the trees of the field." *Ezekiel*, 31 - 34.

¹ Evans v. Merryweather, 3 Scam. (Ill.) R. 496.

kitchen purposes, or for watering cattle ; and provided the water, which is diverted for irrigation, shall (unless absorbed on the land) be returned to its natural channel, before the stream leaves his land. And if a person, by absorption on his own land, can dispose of the whole of the water, excepting only a bare sufficiency for the purposes before mentioned, he has the prior right, because he is the first on the stream, and has the first opportunity.¹ In another case, in the same State, it appearing that the diversion of the water was for the purpose of irrigation ; and that all the water, which was diverted, was absorbed on the land, or returned to the natural channel, before it left the land ; the Court held, that no action would lie.² In the year 1800, the same doctrine was countenanced in Massachusetts ; and the opinion of the Court was then given, that, if the defendant took the water for any other purpose than watering his own meadow, or if he did not return what was not expended in that way, into the usual channel, after using what was necessary, the action might be maintained. The verdict was accordingly for the defendant.³ So, in *Weston v. Alden*,⁴ the Court gave their opinion as follows : — “ A man owning a close on an ancient brook, may lawfully use the water thereof for the purposes of husbandry, as watering his cattle, or irrigating his close ; and he may do this, either by dipping water from the brook and pouring it upon his land, or by making small sluices for the same purpose ; and if the

¹ *Perkins v. Dow*, 1 Root's (Conn.) R. 535. As to prior occupation see Post, § 130.

² *Haywood v. Mason*, 2 Swift's Syst. 87 ; and 1 Root's (Conn.) R. 537.

³ *Bent v. Wheeler*, Sullivan on Land Titles, 273.

⁴ *Weston v. Alden*, 7 Mass. R. 136.

owner of a close below is damaged thereby, it is *damnum absque injuria*." These precedents appear to be much more liberal in favor of upper riparian owners than is warranted by cases of a subsequent date; and with regard to the two which have been cited from the reports of Connecticut, they, in the opinion of the late Chief Justice SWIFT of that State, not only reverse the Common law, but are repugnant to a statute of that State, in affirmance of the Common law; which, says he, must remove all doubt upon a question which has been frequently agitated.¹ With respect to the case of *Haywood v. Mason*, the same learned Judge has affirmed, that it not only gives to the upper riparian proprietors on rivers the advantages to which the lower are entitled, but denies that even seventy years' exclusive enjoyment, in any particular manner, will confer an absolute right.²

§ 123. In the case of *Colburn v. Richards*,³ in Massachusetts, it was held, that the water could not be taken out for irrigation, to the injury of a mill below. The Court endeavored to reconcile this decision with that in *Weston v. Alden*, as follows:—"There is this difference between that case and the one now before us. In that case, there was no obstruction to the course of the water; sluices were made for it into the land of the defendant, in that action; and the water, after washing his lands, still passed down the natural channel. Nor does it appear that the plaintiff, in that case, had acquired a right, by prescription, to the use

¹ 1 Swift's Dig. 111.

² Opinion of Swift, C. J., in *Ingraham v. Hutchinson*, 2 Conn. R. 584.

³ *Colburn v. Richards*, 13 Mass. R. 420.

of the stream, to carry works which had been erected and maintained at expense ; but he had merely enjoyed the natural benefits of the stream, without any labor or expense of his own. In the case before us, the whole stream was stopped, or at least so much of it as to render the defendant's mill entirely useless. There is no principle upon which this can be justified." The distinction that would seem to have much force, which is attempted to be shown, between the case of *Weston v. Alden* and this case, is, that, in the latter, there was a right in the plaintiff to the use of the water, by *prescription*, for propelling certain works. But the right to use a natural watercourse, is not derived from the erection of a mill, nor by *prescription* ; but it is a right incident to the ownership of the land.¹

¹ See Ante, § 5, *et seq.* All the cases are agreed, that where a natural watercourse is diverted, the plaintiff need not aver that his mill is ancient ; in other words, he need not show a prescriptive right. In one of the earliest reported cases, Doddridge, J., said : — " In this action there was no need that it should be an ancient mill ; for if one erect a new mill on his freehold, and another diverts the watercourse of that mill, as it passes by his land, still, if the water used to follow this course, an action on the case lies against him ; for he cannot use his land or the water, which passes through his land, to the damage of the other ; and that so it had many times been before adjudged." *Rutland v. Bowler*, Palmer R. 290. Again, in an action for diverting a watercourse, running to the plaintiff's mill, the declaration had only a *debet et solet currere* ; and it was adjudged to be good, without saying the mill was an ancient mill ; for, as the action was against a *wrongdoer*, possession was sufficient ; and the Court held, in this case, that an action had lain for diverting a stream, though no mill had been erected. *Pollexfen*, for the plaintiff, went upon the right the owner had in the soil, and said it was lawful for a man to use his own, after what manner he pleased, so as not hurting his neighbor. The defendant, he contended, could no more stop the water, than " where I have a way over several men's land to my land, and I then build my land into tenements, they could stop my way, for that their land is charged with the way." — *Palmer v. Heblethwaite*, Skinner's R. 65, 175. In an action for stopping lights, exception was taken, because the declaration did not state *antiquum*

§ 124. In the case of *Anthony v. Lapham*,¹ decided by the Supreme Court of Massachusetts, in 1827, reference is again made to the case of *Weston v. Alden*. The defendant contended, that he took no more water than was useful to him for the purpose of irrigating his lands, and that he had a right to all that was necessary for this purpose, although he might thereby deprive the plaintiff of a portion of the water he had before used for the same purpose. It did not appear that the plaintiff had ever appropriated the water in any other way than for irrigating his land. The Court said, if the case was to be supported at all, it was upon the authority of *Weston v. Alden*, the difference being that there the defendant took the water by small sluices over his land and returned it into the natural channel; but, in the case before them, the water was stopped by a dam; a great deal of it absorbed by the land, or lost by evaporation; and the surplus not returned into the natural channel; so that the plaintiff was deprived of the privilege which belonged to him. The Court then proceeded to say,—“Every man through whose land water passes, may use it for watering his cattle or irrigating his land; but he must so use it, in this latter way, as to do the

messuagium; but Hale said,—“If a man has a watercourse running through his ground, and erects a mill upon it, he may bring his action for diverting the stream, and not say *antiquum molendinum*; and upon the evidence, it will appear if the defendant hath ground through which the stream runs before the plaintiff’s; and he *used* to turn the stream as he saw cause; for *otherwise*, he cannot justify it, though the mill be newly erected.” — 1 Ventr. 237. See also, to the same effect, *Sands v. Trefusis*, Cro. Car. 575.; *Brown v. Best*, 1 Wils. R. 174; and *Twiss v. Baldwin*, 9 Conn. R. 291.

¹ *Anthony v. Lapham*, 5 Pick. (Mass.) R. 175.

least possible injury to his neighbor, who has the same right." The judgment, which had been for the plaintiff, was affirmed.

§ 125. The Supreme Court of Maine say, — "The proprietor of the watercourse has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes. And he may make a reasonable use of the water itself, for domestic purposes, for watering cattle, or even for irrigation; *provided* it is not unreasonably detained or essentially diminished. For, although by the case of *Weston v. Alden*, the right of irrigation might seem to be general and unlimited; yet subsequent cases¹ have restrained it consistently with the enjoyment of the common bounty of nature, by other proprietors, through whose land a stream had been accustomed to flow; and the qualification of the right by these latter decisions, is in accordance with the Common Law."²

§ 126. In a case in the Supreme Court of New York, the parties were owners of adjoining farms. On the farm of the defendant, within five or six rods of the land of the plaintiff, there was a living spring, the water from which, in its natural channel, ran over the land of the plaintiff. The defendant diverted the water from his spring and caused it to flow upon his meadow to the extent of three or four acres, for which the plaintiff recovered. The Chief Justice, in giving the opinion of the Court, said, — "The defendant has a right to use so much as is necessary for his family and his cattle, but he has no right to use it for irri-

¹ The Court cite *Colburn v. Richards*; *Cook v. Hull*; and *Anthony v. Lapham*, *ut sup.*

² *Blanchard v. Baker*, 8 Green. (Maine) R. 253.

gating his meadow, if thereby he deprive the plaintiff of the reasonable use of the water in its natural channel.”¹

§ 127. In an action on the case, for the diversion of a watercourse, in Connecticut, as lately as the year 1843, it appeared, that the defendant, who was the owner of the land on which there was a spring, took water from it for his domestic and culinary purposes, and for watering his cattle, by means of an artificial aqueduct from the spring to his house and barn; and after the use of what was necessary for such purpose, the surplus was not returned to the stream before it reached the plaintiff's land below, but was allowed to escape, and either irrigate the defendant's land, or to be lost, by flowing constantly through small apertures in penstocks, at the house and barn, in order to keep the water from freezing in winter, and becoming impure in summer; it being necessary, for these purposes, that it should be kept thus running. It was held, that these acts did not necessarily constitute an infraction of the plaintiff's right; and that the case was not varied by the circumstance, that the water was appropriated by the defendant to his use at a place on his land lower than where the stream, in its natural course, entered the land of the plaintiff. The Court took the ground that the water so used, was not used in an unreasonable manner.²

§ 128. We now proceed to the case which has been already referred to as having been decided by the Supreme Court of Illinois,³ where the general question

¹ *Arnold v. Foot*, 12 Wend. (N. Y.) R. 330.

² *Wadsworth v. Tillotson*, 15 Conn. R. 366.

³ *Evans v. Merriweather*, 3 Scam. (Ill.) R. 496; and *Ante*, § 121.

was presented, as to what extent riparian proprietors upon a watercourse can use the water, and the Court say,—“Each riparian proprietor is bound to make such a use of running water, as to do as little injury to those below him as is consistent with a valuable benefit to himself. The use must be a reasonable one. Now the question fairly arises, is that a reasonable use of running water by the upper proprietor, by which the fluid is entirely consumed? To answer this question satisfactorily, it is proper to consider the wants in regard to the element of water. These wants are either natural or artificial. Natural are such as are absolutely necessary to be supplied in order to his existence. Artificial, such only, as by supplying them, his comfort and prosperity are increased. To quench thirst, and for household purposes, water is absolutely indispensable. In civilized life, water for cattle is also necessary. These wants must be supplied, or both man and beast will perish. The supply of a man’s artificial wants is not essential to his existence; it is not indispensable; he could live if water was not employed in *irrigating* lands, or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is indispensable to the cultivation of the soil, and in them, water for *irrigation* would be a natural want. Here it might increase the products of the soil, but it is by no means essential, and cannot, therefore, be considered a natural want of man. So of manufactures, they promote the prosperity and comfort of mankind, but cannot be considered absolutely necessary to his existence.” From these premises, the Court then proceed to state the conclusion resulting, namely,—“That an individual owning a spring on his land, from which water flows in a current through his

neighbor's land, would have the right to use the whole of it, if necessary to satisfy his natural wants. He may consume all the water for his domestic purposes, including water for his stock. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not supply water more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufactures. So far then as natural wants are concerned, there is no difficulty in furnishing a rule by which riparian proprietors may use flowing water to supply such natural wants. Each proprietor in his turn may, if necessary, consume all the water for these purposes. But where the water is not wanted to supply natural wants, and there is not sufficient for each proprietor living on the stream to carry on his manufacturing purposes, how shall the water be divided? We have seen that without a contract or grant, neither has a right to use all the water; all have a right to participate in its benefits. Where all have a right to participate in a common benefit, and none can have an exclusive enjoyment, no rule, from the very nature of the case, can be laid down, as to how much each may use without infringing upon the rights of others. In such cases, the question must be left to the judgment of the jury, whether the party complained of has used, under all the circumstances, more than his just proportion."

§ 129. It is submitted, whether it may be not fairly deduced from the preceding authorities, that, for any

essential diminution of the water of a watercourse, which nature has directed to run in a certain and determinate channel, for *any* purpose, the law, in this country, will interpose? Streams of water, says Kent, are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of water to domestic, agricultural, and manufacturing purposes; *provided*, the use of the water be made under the limitation, that he do no material injury or annoyance to his neighbor below him, who has an *equal* right to the subsequent use of the same water. In a late case in the English Court of Exchequer, the Chief Baron considered, that the rule laid down by Kent is the true rule. In England, says he, it is not very clear, that such a user (*i. e.* for irrigation) would be permitted as arising out of the right to the use of the water *jure naturæ*, “but no doubt if the stream were only used by the riparian proprietor and his family, by drinking it, or for the supply of domestic purposes, no action would lie for this ordinary use of it; and it may be conceived, that if a field be covered by houses, the ordinary use by the inhabitants might sensibly diminish the stream; yet no action would, we apprehend, lie, any more than if the air was rendered less pure and healthy by the increase of inhabitants in the neighborhood, and by the smoke issuing from the chimneys of an increased number of houses.”¹

¹ Wood v. Ward, Law Journ. R. for August, 1849. The Court below, in Randall v. Silverthorn, 4 Barr, (Penn.) R. 173, said as follows: “The plaintiff was entitled to all reasonable use of the water on his land for agricultural and manufacturing purposes, provided he returned it to its

6. *Of the Effect of Prior Occupation by a Riparian Proprietor.*

§ 130. A question of much importance has been, on several occasions, discussed, whether a title to the use

channel before leaving his land, without material and unreasonable diminution." So in *Miller v. Miller*, 9 Barr. (Penn.) R. 74. The just and equitable principle, Kent says, (3 Comm. 441,) is given in the Roman Law: *Sic enim debere quem meliorem agrum suam facere, ne vicini deteriores faciat*. The Code Napoleon, Nos. 640–645, establishes the same just rules. And see also Dig. 39, 3, 4, 10; Code, lib. 3, tit. 34, 1, 7; Pothier, *Traité du Contrat de Société*, Second App. Nos. 236, 237. In France, where every one may use the water "*en bon père de famille, et pour son plus grand avantage*." Code Civil, Art. 640, note a, by Pailliet. See his *Manual de Droit Français*, Paris, 1838, cited by Baron Parke, in 20 Law Jour. R. 212, & S. C. 4 Eng. Law & Eq. R. on p. 477.

The case of *Embrey v. Owen*, in the English Court of Exchequer, was decided in 1851,* and the decision was, that a riparian proprietor has a right to irrigate his land by water from the stream, provided he does not thereby interfere with the rights of others; and whether the use made by him of the stream for this purpose be reasonable and permitted, or not, depends on the *circumstances* of each case: That where an action on the case founded in such an irrigation, is brought against a riparian proprietor by another having a mill lower down on the stream, it appearing that the irrigation does not take place continuously, but only at intermittent periods, when the river is full, and that no damage is done thereby to the working of the mill, and that the diminution of the water is not perceptible to the eye; such is a reasonable use of the water for which no action can be maintained. It was argued by the counsel for the plaintiff, that the plaintiff had a *right* to the full flow of the water in its natural course and *abundance*, as an incident to the property in the land through which it flowed; and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it is an injury to a *right* (see *post*, 427, *et seq.*) and if continued would be the foundation of a claim of adverse right in that proprietor. Baron PARKE, who delivered the judgment of the court, (the court consisting of himself, ALDERSON, PLATT, and MARTIN,) said, that he by no means disputed the truth of the counsel's proposition with respect to every description of right. And he

* *Embrey v. Owen*, 20 Law. Jour. R. (N. S.) 212, and S. C. 4 Eng. Law & Eq. R. 466.

of running water is acquired by mere *occupancy*, so as to authorize any diversion of it from its accustomed

added: "Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show a violation of a right, in which case the law will presume damage — *injuria sine damna* is actionable — as was laid down by Lord Holt in the case of *Ashby v. White*, 2 *Ld. Raym. R.* 938, and many subsequent cases. But in applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them. The law as to flowing water is now put on its right footing, by a series of cases, and is fully settled in the American courts." (The learned Baron, in the course of his opinion, cited *Webb v. Portland Manuf. Co.*, 3 *Sumn. R.* 189, and 3 *Kent, Comm. Lect.* 52, 439 – 445.) "The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *public juris*, not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it. This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of *all* the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; for such a use it will, though there may be no *actual* damage to the plaintiffs. This [a reasonable use] must depend on the circumstances of each case. On the one hand, it would not be permitted that the owner of a tract of many thousand acres of porous soil abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden,

course, or any obstruction or detention of it. Blackstone has stated water to be one of those things, the property in which is acquired by occupancy, and that, by first occupancy, a property is acquired in the *current*;¹ and in *Williams v. Morland*,² and in *Liggins v. Inge*,³ there are dicta to the effect, that, by the law of England, the possessor who first appropriates any part of water flowing through his land to his own use, has a right to the use of so much as he thereby appropriates against any other. The dictum of Lord Chief Justice TINDAL in the case last named, is to this effect: "Water flowing, it is well settled by the law of Eng-

or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not, and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man, and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another, to a similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel for domestic purposes, without its in some degree impairing the natural purity of the air; he cannot erect a building, or plant a tree near the house of another, without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all." *

¹ 2 Black. Com. 402.

² *Williams v. Morland*, 2 Barn. & Cress. R. 913.

³ *Liggins v. Inge*, 7 Bing. R. 692.

* The decision in this case was recognized and approved in *Norham v. Harley*, 22 Law Jour. R. (N. S.) 183, and S. C. 18 Eng. Law & Eq. R. 164.

land, is *publici juris*. By the Roman law, running water, light, and air, were considered some of those things which were *res communes*, and which were defined things, the property of which belongs to no person, but the use to all; and by the law of England, the person who first appropriates any part of this water flowing through his land to his own use, has the right to the use of so much as he then appropriates, against any other."

§ 131. The doctrine laid down in *Cary v. Daniels*, in Massachusetts,¹ seems in accordance with that of C. J. TINDAL SHAW, C. J., in giving the opinion of the Court in that case, speaks of the right to the use of the water inherent in the land as a right "*publici juris*;" and he considers, that the rule that the limitation of the right to use of the water of a running stream, that the use must not be inconsistent with a like reasonable use by the other riparian proprietors on the same stream, above and below, is to be taken with a *qualification* growing out of the nature of the case, which qualification he thus explains: "The usefulness of water for mill purposes depends as well on its fall as its volume. But the fall depends upon the grade of the land over which it runs. The descent may be rapid, in which case there may be fall enough for mill sites at short distances; or the descent may be so gradual as only to admit of mills at considerable distances. In the latter case, the erection of a mill on one proprietor's land may raise and set the water back to such a distance as to prevent the proprietor above from having sufficient fall to erect a mill on his land.

¹ *Cary v. Daniels*, 8 Met. (Mass.) R. 466.

It seems to follow, as a necessary consequence from these principles, that, in such case, the proprietor who first erects his dam for such a purpose has a right to maintain it, as against the proprietors above and below; and to this extent, prior occupancy gives a prior title to such use. It is a profitable, beneficial, and reasonable use, and therefore one which he has a right to make. If it necessarily occupy so much of the fall as to prevent the proprietor above from placing a dam and mill on his land, it is *damnum absque injuria*. For the same reason, the proprietor below cannot erect a dam in such a manner as to raise the water and obstruct the wheels of the first occupant. He had an equal right with the proprietor below to a reasonable use of the stream; he had made only a reasonable use of it; his appropriation to that extent, being justifiable and prior in time, necessarily prevents the proprietor below from raising the water, without interfering with a rightful use already made; and it is therefore not an injury to him. Such appears to be the nature and extent of the prior and exclusive right, which one proprietor acquires by a prior reasonable appropriation of the use of the water in its fall; and it results, not from any originally superior legal right, but from a legitimate exercise of his own common right, the effect of which is, *de facto*, to supersede and prevent a like use by other proprietors originally having the same common right. It is, in this respect, like the right in common, which any individual has, to use a highway; whilst one is reasonably exercising his own right, by a temporary occupation of a particular part of the street with his carriage or team, another cannot occupy the same place at the same time. But such appropriation of the stream to mill purposes upon the principles

stated, gives the proprietor a prior and exclusive right to such use only so far as it is actual. If, therefore, he has erected his dam and mill, with its waste-ways, sluices, and other fixtures necessary to command the use of the water to a certain extent, and there is a surplus remaining, the proprietor below may have the benefit of that surplus. If he erects a dam and mills, for the purpose of using and employing such surplus, he is, as to such part of the stream, the first occupant, and makes the first appropriation. As to that, therefore, his right is prior and exclusive. And although the proprietor above might, in the first instance, have raised his dam higher, keeping within the limits of a reasonable use, yet after such appropriation by the proprietor below, he cannot raise his dam and take such surplus; because, as to that, the lower proprietor has acquired a prior right.”¹

§ 132. Now the proper construction of the Roman law,² as adduced by C. J. TINDAL, and referred to by C. J. SHAW, is, that it considered running water, not as a *bonum vacans*, in which any one might acquire a property; but as public and common *in this sense only*, that all might drink it, or apply it to the necessary purpose of supporting life; and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only. And no other interpretation should be put upon the passage in Blackstone.³

¹ See Post, § 134.

² See Inst. Tit. 1, s. 1; and Vinnius, Comm. on the Inst.; Dig. B. 43, tit. 13.

³ Per Lord Denman, C. J., in *Mason v. Hill*, 5 B. & Adol. R. 1; and

§ 133. The case of *Mason v. Hill*, which may be considered as having settled the law on this subject in England, came twice before the Court of King's Bench.¹ Upon the first trial there was a verdict for the defendant; but a new trial was granted, by the unanimous opinion of the Court delivered by Lord TENTERDEN, upon the ground that the defendant could not, by law, acquire a right to the water by the prior use of it, unless the enjoyment was undisturbed for *twenty years*. Upon the next trial, the question was raised by special verdict, and was elaborately discussed at the bar, and after time taken by the Court, judgment was pronounced by Lord C. J. DENMAN. The learned Judge, in giving judgment, said: "The position, that the first occupant of running water for a beneficial purpose, has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrongdoer; and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. But it is a very different question, whether he can take away from the owner of the land below, one of its natural advantages which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it

per Baron Parke in *Embrey v. Owen*, 20 Law Jour. R. (N. S.) Exch. 212, and S. C. 4 Eng. Law & Eq. R. 466. And see Ante, § 121, *et seq.*

¹ *Mason v. Hill*, *wb. sup.*, and 3 B. & Adol. R. 304.

altogether, by anticipating him in its application to a new purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall, within its limits, might, at any time, be taken away ; and, by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another. We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases of *Bealy v. Shaw*,¹ *Saunders v. Newman*,² and *Williams v. Morland*.³ It appears to us also, that the doctrine of Blackstone, and the dicta of learned Judges, both in some of those cases, and in that of *Cox v. Mathews*,⁴ have been misconceived." The judgment of Sir John Leach, in *Wright v. Howard*,⁵ also settles, that no appropriation of running water, except for such a period as will confer an easement, can diminish the natural rights of other parties possessing lands along the course of the stream.

§ 134. The weight of authority in this country, is decidedly in favor of the doctrine that, if one riparian proprietor upon a natural watercourse, builds a mill, and a supra-riparian proprietor diverts the water, the owner of the mill may recover for the *injury to the mill*, although, before he built, he could only recover for the

¹ *Bealy v. Shaw*, 6 East, R. 208.

² *Saunders v. Newman*, 2 B. & Ald. R. 258.

³ *Williams v. Morland*, 2 B. & Cress. R. 915.

⁴ *Cox v. Mathews*, 1 Ventr. R. 137.

⁵ *Wright v. Howard*, 1 Sim. & Stu. R. 190. This accords with the law as laid down by Sergeant Adair, Chief Justice of Chester, in *Prescott v. Phillips*, cited in *Bealy v. Shaw*, 6 East, R. 208.

natural uses of the water, as needed for his family and his cattle. But if, instead of building a mill, he had diverted the stream, he cannot justify it against a proprietor below, upon the ground that he had thus made an artificial use of the water, before the other had made any such application of it. Every riparian proprietor, necessarily, and at all times, is using the water running through it, in so far at least as the water imparts fertility to the land, and enhances the value of it.¹ There is, therefore, no prior or posterior in the use, for the land of each enjoyed it alike from the origin of the stream; and the priority of a particular new application, or artificial use of the water, does not, therefore, create a right to that use; but the existence or non-existence of that application, at a particular time, measures the damages incurred by the wrongful act of another, in derogation of the general right to the use of the water, as it passes to, through, or from the land of the party complaining. The right is not founded in user, but is inherent in the ownership of the soil; and when a title by use is set up against another proprietor, there must be an enjoyment for such a length of time as will be evidence of a grant. This is the doctrine expressly laid down by the Supreme Court of North Carolina,² who rely for its support upon the above case of *Mason v. Hill*. To give such a construction to the passage from Blackstone above quoted, as that the owner of a mill-site who first occupies it, by the erection of a mill or dam, may use and appropriate the water to the injury of any other riparian proprietor above or below him, (unless the use

¹ *Pugh v. Wheeler*, 2 Dev. & Batt. (N. C.) R. 50. And see *Ante*, § 8, 9, 92, 93.

² See *Pugh v. Wheeler*, *ub. sup.*

and appropriation has been of so long continuance as to afford the presumption of a grant,) would be an extension of the doctrine of occupancy, in the words of Mr. C. J. THOMPSON, "dangerous and pernicious in its consequences;" and the occupancy, says he, "must be regulated and guarded with a view to the individual rights of all who have an interest in its enjoyment; and the maxim *sic utere tuo ut alienum non lædas*, must be taken and construed with an eye to the natural rights of all."¹

§ 135. By the learned Mr. Justice STORY, the right to have a stream flow on in its accustomed course, is laid down to be a right, which can only be interfered with by an easement acquired by grant, or by an adverse enjoyment for the period of time limited by the statute of limitations for entry upon land. "Mere priority of occupation," says he, "of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupation. That supposes no ownership already existing, and no right to the one already acquired. But our law awards to the riparian proprietors the right to the use in common, as one incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment

¹ *Platt v. Johnson*, 15 Johns. (N. Y.) R. 213. See also *Palmer v. Mulligan*, 3 Caine's (N. Y.) R. 397; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) R. 306.

without interruption, which affords a just presumption of right.”¹ In fact, by numerous authorities in this country, the first appropriator of running water has no right to divert or retain the stream to the extent of such appropriation, to the injury of other riparian proprietors, who shall afterwards seek to use the stream;² though here, as in England, dicta may be found to the contrary;³ and that a diversion of a watercourse, without actual injury to a riparian owner lower down the stream, legally imports damage, (because it is an infringement of right,) is a doctrine powerfully sustained by American authorities.⁴

¹ *Taylor v. Wilkinson*, 4 Mason, (Cir. Co.) R. 397. See also the opinion of the same learned Judge in *Whipple v. Cumberland Manuf. Co.*, 2 Story, (Cir. Co.) R. 661.

² *Gilman v. Tilton*, 5 N. Hamp. R. 231; *Martin v. Bigelow*, 2 Atk. (Verm.) R. 184; *Hoy v. Sterritt*, 2 Watts, (Penn.) R. 327; *Twiss v. Baldwin*, 9 Conn. R. 291; *King v. Tiffany*, *Ib.*, 162; *M'Almont v. Whitaker*, 3 Rawle, (Penn.) R. 84; *Bullen v. Runnels*, 2 N. Hamp. R. 257; *Buddington v. Bradley*, 10 Conn. R. 213; *Tucker v. Jewett*, 11 Conn. R. 311; *Wadsworth v. Tillotson*, 15 Conn. R. 366; *Plumleigh v. Dawson*, 1 Gilm. (Ill.) R. 544; *Stout v. M'Adams*, 2 Scam. (Ill.) R. 67; *Baldwin v. Calkins*, 10 Wend. (N. Y.) R. 167; *Heath v. Williams*, 25 Maine, R. 209; *Davis v. Fuller*, 12 Verm. R. 178. And as to general rights of riparian proprietors, see *Ante*, § 90, *et seq.*

³ In *Strickler v. Todd*, in Pennsylvania, 10 S. & Rawle, (Penn.) R. 63, Duncan, J., in giving the judgment of the Court, appears to accede to the doctrine, that a superior right to the use of a natural watercourse, may be acquired by the simple act of prior occupation; but the right of the plaintiff to recover, in that case, was made to rest upon his uninterrupted enjoyment of the water, for a term of time exceeding twenty years.

⁴ So laid down by Wilde, J., in *Bolivar Manuf. Co. v. Neponset Manuf. Co.* 16 Pick. Mass. R. 241. Also by the Supreme Court of Maine, 3 Fairf. (Me.) R. 407; and see also *Crooker v. Bragg*, 10 Wend. (N. Y.) R. 260; *Baldwin v. Calkins*, *Ib.* 167; *Heath v. Williams*, 25 Maine R. 209; *Whipple v. Cumberland Manuf. Co.* 2 Story, (Cir. Co.) R. 661; *Branch v. Doane*, 17 Conn. R. 402; 18 *Ib.* 233; *Parker v. Griswold*, 17 *Ibid.* 288; *Chapman v. Thames Manuf. Co.* 13 *Ibid.* 269; *Hulme v. Shove*, 3 Green,

7. *Of the Injury by rendering the Water Corrupt and Unwholesome.*

§ 136. It is clearly the duty of riparian proprietors, upon a watercourse, to refrain from erecting upon its banks any works which render the water unwholesome or offensive.¹ It was long ago adjudged to be illegal for a glover to set up a lime pit, for calf or sheep skins, so near the water as to corrupt it.² Lord COKE says, "if two several owners of houses have a river in common between them, and if one of them corrupt the water, the other shall have an action on the case."³ Erecting a cesspool near a well, and thereby contami-

(N. J.) R. 116; *Woodman v. Tufts*, 9 N. Hamp. R. 88; *Bliss v. Rice*, 17 Pick. (Mass.) R. 23; *Blanchard v. Baker*, 8 Greenl. (Me.) R. 253; *Pastorious v. Fisher*, 1 Rawle, (Penn.) R. 27; *Webb v. Portland Manuf. Co.*, 3 Sumn. (Cir. Co.) R. 189. And see *post*, § 427, *et seq.*

¹ 9 Co. R. 59; Dictum of Story, J., in *Tyler v. Wilkinson*, 4 Mason, (Cir. Co.) R. 397, of Lord Ellenborough, in *Bealy v. Shaw*, 6 East, R. 208, and of Lord Denman, in *Mason v. Hill*, 5 B. & Ald. R. 1; 7 Mon. (Ken.) R. 325; *Call v. Buttrick*, 4 Cush. (Mass.) R. 345. Where an action for polluting the water of a watercourse, was referred to an arbitrator, with power to him to regulate the enjoyment of the water: it was held, that an award directing a verdict to be entered for the plaintiff, and that defendant should, at all times, take *all proper and reasonable precautions* for preventing the water from being rendered unfit for plaintiff's use, and in particular, should use a process of filtering mentioned in the award, was bad for uncertainty. The direction as to the particular process was, that the water passing from defendant's to plaintiff's premises, should be passed through filtering lodges, made or to be made, by defendant, so as to be thereby purified and cleansed for plaintiff's use, "so far as the same can be purified and cleansed by the ordinary and most approved process of filtering." It was held, that the description by reference only to the "ordinary and most approved process," was uncertain, and the award bad in this respect also. *Stonehewer v. Farrar*, 6 Adol. & Ell. R. (N. S.) 730.

² Year Book, Hen. 2, b. 6.

³ Co. Litt. 200; 13 Hen. 7, 26.

nating the water, has been held to be actionable.¹ The erection of a tan-yard, it has been held, is illegal, provided it has the effect of rendering the water unwholesome, whether the riparian proprietor below use it for distillation, or for culinary or domestic purposes.² No user, for a less time than twenty years, will justify the letting off upon the neighboring land, water which has been used for the precipitation of minerals, and which is thereby rendered noxious.³ In the case of an artificial watercourse, made for the purpose of draining mines, if the drainage water has flowed for twenty years, in a pure state, in consequence of the working of the mines having been discontinued, over premises of a person who has used it for that period, the working of the mines cannot be resumed, so as to render the water foul, and thus disturb his enjoyment.⁴

§ 137. Neither can a riparian proprietor use the water in a manner so as to corrupt the *atmosphere*. An action on the case was brought to recover special dama-

¹ Norton v. Scholefield, 9 M. & Welsb. R. 565.

² Howell v. M'Coy, 3 Rawle, (Penn.) R. 397.

³ Wright v. Williams, 1 M. & Welsb. R. 77.

⁴ Magor v. Chadwick, 11 Adol. & Ell. R. 371. The act of the State of Tennessee, of 1830, ch. 39, directed that the owners of mills should cut down and remove standing or decayed timber in their mill-ponds, west of Tennessee river, and made such owners indictable if they failed. And the act of 1832, ch. 79, authorized one G. by name, to build a dam without cutting down and removing the timber in his pond; and it was held, that the act of 1832 only exempted the defendant G. from the penalty of the act of 1830, and left him liable as other persons to indictment, if his dam created a nuisance; the Court, in giving judgment, saying, — "The legislature should not be readily supposed as meaning to violate that *fundamental principle* of social, natural, and municipal law, which prescribes to every one, in the use and enjoyment of his own property, the necessary limitation, that *he shall not injuriously affect the rights of others.*" State v. Gainer, 3 Humph. (Tenn.) R. 39.

ges sustained by the plaintiff and his family, in consequence of a mill-dam erected by the defendant; and the plaintiff alleged in his declaration, that the dam, by overflowing the adjacent lands, rendered the atmosphere exceedingly impure and unhealthy, and thereby occasioned the sickness of himself and family, &c. It appeared, on the trial, that not only the plaintiff and his family, but the neighborhood generally, suffered by disease, occasioned by the defendant's dam, and it was insisted, that, as the injury was general, it was a bar to the recovery of individual damages. The Court held, that "Every member of society is bound by the principles of natural justice, so to use his own property, as not to injure the rights of others; and if an individual erects a mill-dam, which creates disease and sickness, he must be responsible for the consequences." It was also held, that it was no defence to the action, that the injury affected the whole neighborhood, and that the civil remedy was not merged by an indictment and conviction.¹

§ 138. In Virginia, under the laws of which State, in relation to the erection of mills, the finding of a jury, in a "mill case," that probably the health of certain families who live near the pond, will be annoyed by the stagnation of the water, is conclusive against a petitioner to erect a dam."²

§ 139. An indictment for a nuisance in erecting and maintaining a dam, upon the defendant's land, alleged that, by reason of the dam, the animal and vegetable substances brought down the stream, were collected

¹ Story v. Hammond, 4 Ohio, R. 883.

² Mayo v. Turner, 1 Munf. (Va.) R. 405.

and accumulated in large quantities, and became offensive, and corrupted the water, &c. It was held, that though the proof showed the injury to have resulted from the alternate rise and fall of the water in the pond, or from the action of the sun upon the vegetables growing on the margin, the substance of the issue was maintained; and this, notwithstanding the stream was not a public highway.¹

§ 140. But to authorize the abatement of a dam, in these cases, on the ground of its being a nuisance, it must, at the time it is abated, be considered as a nuisance. That it had been a nuisance, and was likely to be so again, will not justify the proceeding. The fears of persons, however reasonable, that a thing will become a substantial annoyance, public or private, do not make a nuisance which is actionable, or which may be abated.²

§ 140 *a*. The defendant diverted a stream as it passed through his premises, but restored it *undiminished*, as to the quantity of water, to its former channel, before it reached the premises of the plaintiff. The defendant also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated; and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances, the Lord Chancellor, COTTENHAM, dissolved an injunction, which had been granted by the Vice-Chancellor, restraining the defendant from diverting or using the water.³

¹ *People v. Townsend*, 8 Hill, (N. Y.) R. 479.

² *Gates v. Blincoe*, 2 Dana, (Ken.) R. 158.

³ *Elmhirst v. Spencer*, 2 Macnaught. & Gord. Ch. R. 45. (1849.)

§ 140 *b*. In *Wood v. Sutcliffe*,¹ an injunction was asked for to restrain the defendant from pouring into the stream any dye-wares, or dye liquors, or madder, or indigo, or potash, or matters of that description, which tend to pollute the stream, to the damage of the plaintiff's works. And by the Vice-Chancellor,—"I conceive that if the plaintiffs have established such a legal right as that which I have mentioned, and, while they are in the enjoyment of that right, another person comes and erects machinery, or any manufacturing works, on that stream above the plaintiff's works, and by his manufacturing process so fouls the water as that, instead of coming, as before, pure and unsullied to the plaintiff's works, it arrives at the plaintiff's works in a less pure and serviceable state than before, so as seriously and continuously to obstruct the effective carrying on of the plaintiff's manufacture,—if that be the case, and if the restraining of those acts by injunction will restore, or tend to restore, the plaintiffs to the position in which they have a right to stand, and in which they before stood; and if the injury which is occasioned by the works complained of, is of such a nature as that the recovery of pecuniary damages would not afford an adequate compensation—that is, such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before; and if, moreover, (for there were several conditions,) the plaintiffs *do not sleep on their rights*, and do not acquiesce, either actively or passively, in the acts which they complain of, but use diligence and vigilance to take such steps as are proper and necessary

¹ *Wood v. Sutcliffe*, 16 Jur. 75, and S. C. 8 Eng. Law & Eq. R. 217.

for the vindication of their rights — if those conditions occur in such a case as that which is now presented here, the plaintiffs, the parties so injured, have, I conceive, as a general rule, a right to come to the Court of Equity, and say, ‘Do not put us to bring action after action for the purpose of recovering damages, but interpose by a strong hand, and prevent the continuance of those acts altogether, in order that our legal rights may be protected and secured to us.’”

CHAPTER V.

OF THE RIGHT TO THE USE OF WATER, AS DERIVED FROM
SPECIAL GRANTS AND RESERVATIONS.

1. Of Natural and Artificial Easements.
2. Extent of the Right Granted or Reserved.
3. Mill and Appurtenances.
4. Secondary Easements.
5. *Lex Loci*.
6. How Easements in Watercourses are Created.
7. Reservations and Exceptions of Water Rights in Grants of Land.
8. Unity of Possession and Ownership.

1. *Of Natural and Artificial Easements.*

§ 141. THE right to the use of a watercourse, *ex jure naturæ*, or as incident to the land, is subject, of course, to be abridged, enlarged, or modified by grant; and, besides the general rights to a natural watercourse, the law recognizes the existence of certain rights accessory to these general rights.¹ If a miller, or manufacturer, purchases the land itself, over which the water runs, it is evident he would then have a corporeal tenement, and the right which he would possess, in respect of his watercourse, would be real;² but if he should purchase a water privilege, or a portion of water power, without any part of the bed of the river, he, in that case, would gain an incorporeal hereditament, or *easement*. The right to a watercourse in its natural

¹ 3 Kent, Comm. 441.

² See *Ante*, § 90, *et seq.*

course, and derived from the ownership of the land over which it passes, may, it is true, in one sense, be called by that name, that is, a *natural* easement, but the term, as generally used, means an *artificial* easement, as, the right to interfere with the accustomed course of running water, by diverting it or keeping it back upon the land above, or of transmitting it altered in quality or quantity to the land below.¹ Such artificial easements may be derived from a grant made by the riparian proprietors, whose interests are affected; and, in fact, they may parcel out the water, and combine the water power in any manner they may see fit.² Bracton appears to consider the obligation to respect the natural course of a flowing stream, as a duty imposed by law; and that, unless justified by an easement, a man has no more right to divert the course of a stream, than to discharge water on his neighbor's land.³ An artificial easement is something superadded to the ordinary rights of property; and it may be said to wear a double aspect; first, it destroys *pro tanto*, the natural easement of the flow of water in its accustomed course; and, secondly, it confers a new right, the disturbance of which gives a good right of action.⁴ It may be specially granted, or it may be included in a more general grant, as, for instance, a grant of a privilege of using the water in derogation of the riparian right, would include the secondary easement of *right of way*, or of access to the water, *ex necessitate*.

§ 142. *Easement* is from the French word *aise*, and is

¹ Gale & What. on Easem. 88.

² *Bardwell v. Ames*, 22 Pick. (Mass.) R. 333.

³ Bract. l. 4, fol. 221.

⁴ G. & What. on Easem. 89.

defined to be a privilege or convenience which one neighbor has of another *without profit*,¹ as a right of way, a right to bring water through another's land, &c.;² and it may properly be called a right of accommodation on another's land, as distinguished from that which is directly *profitable*. Easements are treated of by the civilians, under the name of *services*, some of which they call *real*, and some *personal*. The former is a service which one estate owes to another; or the right of doing something, or of having a privilege in one man's estate, for the advantage and convenience of the owner of another estate. It has the appellation of *prædial*, because it cannot be constituted *sine prædiis*, that is, without lands and tenements. The estate unto which the service is due, is called *prædium dominans*, or the ruling estate, and the other estate which suffers or yields the service, is called *prædium serviens*, or an estate subject to a privilege or service. To constitute such service, it is therefore necessary that there be two estates, the one giving, and the other receiving the advantage.³ By a *personal* service, is understood

¹ Easements are specifically distinguished from other incorporeal hereditaments, by the absence of all right to participate in the profits of the soil. A right of way, or the right to receive water, passing across a neighbor's land, may be claimed as an easement; but the right to take something out of the soil, as turf or coal, is a profit, *a prendre*, and not an easement. G. & What. on Easem. 5; 5 Adol. & Ell. R. 764; 3 Ib. 554; 3 Nev. & Per. 257.

² 1 Bla. Comm. 20; Co. Litt. 19, 20; 2 Jac. Law Dict. 382; *Hewlins v. Shippam*, 5 B. & Cress. R. 221; *Downing v. Baldwin*, 1 S. & Rawle, (Penn.) R. 298.

³ Ayl. Civil Law, tit. 5, *Of Services*; Domat. Civ. Law, L. 1, t. 12. The Roman law sets no limits to the number of prædial servitudes; but it prescribes the general conditions that are required to constitute such a servitude, (§ 307, 308.) Under these conditions, therefore, all the various rights that one piece of land can enjoy over another, may be granted as

such as has not been constituted for the benefit of the estate, but which is created for the use of the person merely,¹ and thus differs from an easement which is imposed upon corporeal property, and is attached to the soil of the servient tenement. The utmost extent of the obligation imposed upon the owner of the servient tenement, is not to alter the condition of it, so far as to interfere with the enjoyment of the easement by the dominant.²

§ 143. The service of a right of way (*iter*)³ belongs to the most familiar and important class of easements. It is a comprehensive class, and is susceptible of almost

prædial servitudes. Accordingly, the prædial servitudes expressly mentioned in the Roman law, and enumerated in § 310 – 316, are to be regarded only as examples of such servitudes as are of most frequent occurrence. 1 Kauff. Mack. 339. The general principles with regard to prædial servitudes, are as follows: 1. The prædial servitude must have a *causa perpetua*, i. e. the land servient must, from its natural condition, be permanently capable of affording the intended advantage to the land entitled; and that too without any necessity for positive action on the part of the proprietor of the land servient. 2. The servitude is to be regarded as an appurtenance of the land entitled; hence it can be neither alienated, mortgaged, nor leased without the land, nor can it be transferred from the same, to another piece of land. 3. Prædial servitudes are indivisible, and, therefore, cannot be partially acquired, exercised, or lost; yet they may be restricted as to time and place, and also with respect to the mode of their exercise; and their commencement and termination may likewise be made dependent on conditions. 4. When no restriction has been made, a prædial servitude may regularly be exercised over all the land servient; but such exercise must always be confined to the real necessities of the dominant land. See 1 Kauff. Mack. 336, and Heineccius, Diss. *De Causa Servitutum Perpetua*, in his works, vol. 3, p. 177. Justin. Inst. lib. 2, tit. 3, *De Servitutibus rusticorum et urbanorum prædiorum*.

¹ See Domat, *ut sup.*, 2 Fred. Code, 81.

² Gale & What. on Easem. 4.

³ To the rights of way by land and by water, belong the *servitus itineris*, 1 Kauf. Mack. 343; and concerning the Roman rights of way, see Biener, *Diss de differentiis itineris actus et viæ genuinis*. Leipsic, 1804.

infinite variety. The right may be limited, as to intervals of time, as a way to be used on a certain day in the week ; or it may be limited as to the extent of the user authorized, as a foot-way, horse-way, or carriage-way ;¹ or to a way for the purpose only of repairing a dam. The right of conducting water through one estate, for the use of an adjoining estate, is an easement, or a prædial service known to the Romans, by the name of service *aquæductus*, and is of use, say the civilians, when S has a scarcity of water, and requires it for his cattle, his lands, or his mills.² Distinguished from this, is the personal service, or, at common law, the right of *profit*, of taking water out of another's well or pond, which the civilians call service *aquæhaustus* ; and to this service is attached the prædial service of a right of way, for going to, or returning from, the well or pond.³ Among the many other services recognized

¹ See the examples in Gale & What. on Easem. 138.

² Fred. Code, 81.

³ Ibid. To the servitudes that by the Roman law relate to the conducting and using of water, belong the *aquæductus* (*servitus aquæ ducendæ*), i. e., the right of leading water to one's premises, from, or at least through, another's land, whether beneath, upon, or above, the surface of the earth. As a general rule, the party entitled can lead the water only through pipes, and not through stone channels, and he must lead it in a certain direction. The servitude, moreover, may refer to *aquæ quotidiana*, in which case, the use of the water is not confined to any period of the year ; or only to *aquæ destiva*, where it is restricted to the summer. The *aquæ haustus*, or the *servitus aquæ hauriendæ*, i. e. the right of drawing water from another's spring or well, in which the *iter*, as far as it is necessary to the servitude, is tacitly contained. The servitude *pecoris ad aquam appulsis*, or the right of leading one's cattle to water on the servient ground, in which the *actus*, as far as requisite, is tacitly implied. The servitude *aquæ educendæ*, or the right of leading off the water from one's own, on to another's ground. See 1 Kauff. Mack. 345 ; Hermann, Diss. *De servitute aquæductus*. Leipzig, 1803 ; Winckler, Diss. *De jure impertratae aquæ*. Leipzig, 1749.

by the Roman law, and which have been treated of with much nicety by the commentators on that law, is the service of discharging water from the roof of a building, upon a neighbor's ground, *stillicidii recipiendi*.¹

2. *Extent of the Right Granted, or Reserved.*

§ 144. The accessorial rights or easements in running water, derived from special grants or reservations of riparian proprietors, upon a natural watercourse, are of course to be measured by the nature of the grant or reservation, and the express stipulations therein contained. The grant may be of a certain quantity of water, as much, for instance, as would pass through a pipe or a flood-gate, or a sluice-way of certain dimensions; or it may be of a certain extent of water power, as much, and no more, as is required to operate certain specified machinery; and there is an obvious and important distinction between a grant of the water itself, and a grant of water power.² It has been already stated³ to have been held, that the grant by a legislature of a State, of an exclusive right to the water power of a river does not pass a title to the *corpus* of

¹ The servitude *stillicidii recipiendi, vel fluminis recipiendi, avertendi, immittendi, stillicidium*, is the drip of water from the eaves, and *flumen* is the rain water collected from the roof, and carried off by the gutters. The servitudes here spoken of, consist either in the right to lead off the water from one's house, on to one's own land, for the purpose of cleansing or irrigating the same. The release from a former servitude of this kind was also regarded by the Romans as a special kind of right, similar to a servitude, and was called the *servitus* or *jus stillicidii vel fluminis non recipiendi*. 1 Kauff. Mack. 842.

² See Miller, *ex parte*, 3 Hill, (N. Y.) R. 418; *Bardwell v. Ames*, 22 Pick. (Mass.) R. 333; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) R. 131; *Kennedy v. Scovil*, 12 Conn. R. 317.

³ See Ante, § 94.

the water. In the case referred to, it appeared that the legislature of Pennsylvania granted the privilege of all the water power of the river Schuylkill, and made a subsequent grant to the district of Spring Garden, and Northern Liberties, of the right to erect works, and supply their inhabitants with water from the river ; and it was held, that the grant, and the acts done there under it, were not in derogation of the right under the previous grant of the water power. "Now," said GIBSON, C. J., "a grant of water power is not a grant of the water for any thing else than the propulsion of machinery ; and it consequently does not exclude the use of it by any one else, in a way which does not injure or decrease the power. It is not a grant of property in the *corpus* of the water, as a chattel."

§ 144 *a*. "A right may doubtless be granted, if a grant were necessary, to intercept running water, and confine it in reservoirs for separate use ; but the grant of such a right would not be the grant of a water power. No two things can be more distinct and dissimilar."¹ By a deed between A, owner of Greenacre, and B, owner of Blackacre, it was agreed that A should have, during the first ten days of every month, for the purpose of irrigation, all the water of a stream which flowed through Greenacre into Blackacre, and that at all other times the water should be under the control and at the disposal of B and his heirs and assigns, and be allowed to flow in a free and uninterrupted manner towards and into Blackacre, through a channel therein particularly described ; and that the owner of Greenacre should cleanse and repair the said channel, with

¹ *Mayor, &c. v. Commissioners of Spring Garden*, 7 Barr, (Penn.) R. 348.

liberty to B, his heirs, &c., to do so on his default. It was held, that this deed operated as a grant to B, of an easement of the watercourse therein described at all times, except the first ten days of each month, and that he thereby acquired a right in respect to that channel, and that an alteration of the channel was an injury to his right, in respect of which B might maintain an action.¹

§ 145. Although the words of an instrument of conveyance, taken strictly, impart nothing more than a right to erect a dam, the subject of the grant may be the *water power*. A testator being the owner, in whole or in part, of four contiguous tracts of land, which were in part bounded by a watercourse, devised one of them, situated on the west side of the watercourse, to his son B., under whom the plaintiff derived title. To his son H. he devised his "undivided moiety of certain four acres, called the 'saw-mill land,' together with all the rights and privileges thereunto appertaining." This undivided moiety of the four acre tract had come to the testator, with a privilege appertaining to it, of swelling the water back to the southern boundary of the land devised to his son B. By the same will, the testator gave to his son H., the defendant, the privilege of erecting a dam, at any point between the land devised to his son B., (the plaintiff's land,) and the land on the eastern side of the creek, devised to another son, J., with a right to dig a race through B.'s land. The defendant erected a dam across the creek, within the limits mentioned in the last devise; and afterwards

¹ *Northam v. Hurley*, 22 Law Journ. R. 164, and S. C. 18 Eng. Law & Eq. R. 164.

erected another dam, at a considerable distance below, for the use of "the saw-mill land," where there had many years before been a dam erected, but the use of which had been abandoned, at least thirty-eight years. It was held, that the whole of the property in the watercourse, under the testator's control, passed by these devises, to the defendant; that having been used by him in part, by the erection of the first dam, no presumption should arise from lapse of time, of any release or extinguishment of his right to any other part of it, and that consequently he had a right to erect the second dam. It was impossible, said GIBSON, C. J., not to perceive, that the leading intention of the testator was, to attach to the saw-mill tract, *all the power* which the watercourse afforded, and this with the most extended means of enjoyment which it was in his power to confer; inasmuch as the power being barely sufficient for a mill at the lowest point of the watercourse, within the boundary, would have been altogether worthless, had it been distributed among the different parts of his estate.¹

§ 146. Water power may be granted without its being necessarily annexed to a mill, or confined to any particular location, if the quantity of water conveyed is not increased. Thus, where several owners of mills and mill privileges, on the same water-fall apportioned the water among themselves, and a certain part thereof was assigned to W., the owner of a fulling-mill, for the use of that mill, or for other machinery, requiring equal power: it was held, that the right was not inseparably annexed to buildings, or site, at which water

¹ Nitzell v. Paschall, 3 Rawle, (Penn.) R. 76.

was then used; but that it might be used at any convenient site, at which a mill could be so placed as to take an equal quantity of water, without any greater injury to the other mill owners.¹

§ 147. A grantee of a water right may unquestionably make as much profit of the privilege granted, as it has capacity to promote; and he doubtless may avail himself of any thing which, in its results, works no alteration in the substance of the contract. An artificer, employed at stipulated wages, may use subsequently invented machinery, though it be to make his wages inordinately high, because the nature of compensation for which his employer bargained, is not disturbed by it; but he may not avail himself of means not in ordinary and familiar use at the time, to the prejudice of another, or to gain a surreptitious advantage.²

§ 148. The best judicial construction is that which is made by viewing the subject of the grant, as the mass of mankind would view it; as it may be safely assumed, that such is the aspect, in which the parties themselves view it.³ A result thus obtained, is exactly what is obtained from the cardinal rule of *intention*. Such was the doctrine laid down by the Court, in the case of the Schuylkill Navigation Company v. Moore, in Pennsylvania,⁴ as applicable to hydraulics. In this case it appeared that the plaintiffs, an incorporated company, authorized to use the water of the river

¹ Hurd v. Curtis, 7 Met. (Mass.) R. 94.

² Opinion of the Court, by Gibson, C. J., in Schuylkill Nav. Co. v. Moore, 2 Whart. (Penn.) R. 477.

³ Kennedy v. Scovil, 12 Conn. R. 317.

⁴ Schuylkill Nav. Co. v. Moore, 2 Whart. (Penn.) R. 477.

Schuylkill, for navigation, and to grant out the water for manufacturing purposes, conveyed to the defendant a certain lot of ground, &c., "together with the privilege of drawing from the canal, through the fore bay or tunnel, from time to time, and at all times hereafter, so much water as can pass through two metallic apertures, one of fifty square inches, and the other of two hundred and fifty square inches, respectively, under a head of three feet, to be measured from the middle of each of the said apertures, respectively, to the face of the water of said canal, &c.; to have and hold the said described lot, &c., and the right of drawing from the said canal, the quantity of three hundred square inches of water, in manner aforesaid, under a three feet head," yielding and paying a certain annual rent per inch of water. The defendant applied to the aperture a certain conical tube, called an *adjutage*, by which the flow of water *was enlarged*. It appeared that this invention was known to persons conversant with hydraulics, and to some of the officers of the company, before the making of the contract; and it was held, that the true construction of the contract was, that the water was to be delivered in the ordinary way, and that the defendant had no right to increase the flow by means of an *adjutage*.¹

¹ And see *Vermont Central Railroad Co. v. Hills*, 23 Vt. R. 681. "The Society for Establishing Useful Manufactures," in New Jersey, sold a lot in Patterson, "together with the right of taking from their canal twelve inches square of water;" and a mill was shortly after erected on the lot, and water was drawn from the canal for supplying it. The Society gave a notice to the owner of the mill that they had reason to believe he was taking more than the said quantity of water, and requested him to confine the future use of the water to that quantity; but the owner did nothing to limit the flow, and the Society built a stone wall in their canal

§ 149. Nor can the grantee of water, to be used by means of a *flume*, make a new one of larger dimensions. Where a grist and saw-mill, which were supplied with water by means of a dam and flume, and a clothing-mill and a flume for the supply of that which extended under the other mills, and was connected with and drew water from the flume of the other mills, were all owned by one person; and a conveyance was made of the grist and saw-mill, with the land on which they stood, together with the water privilege, "except the clothing-mill and the land sold therewith;" and on the same day, the clothing-mill "and water privilege for said flume, &c., as now enjoyed," were conveyed to another person; and afterwards, the grantee of the grist and saw-mill permitted his mills, which were old, to decay, and took them down; and the grantee of the clothing-mill thereupon entered upon the land conveyed with the grist and saw-mill, and erected a new flume, for the use of his mill, which was in fact of larger dimensions, and drew more water than his flume drew at the date of the conveyances; it was held, that the grantee of the clothing-mill had not a right to erect, on the land conveyed with the grist and saw-mill, a flume larger than the former one, or which drew a greater quantity of water; and that the grantee of the other mills had a right to remove all of said flume which was within the limits of the land conveyed to

opposite the head-race leading the water on the lot, and placed in the side of the wall a piece of cast-iron, with an aperture in it of twelve inches square; and thereupon the owner of the mill prostrated the said wall. A motion for a preliminary injunction to restrain the owner from taking more water than would pass through an aperture of twelve inches square, was only denied because the state of affairs had existed for *thirty years*. *Society, &c. v. Holsman*, 1 Halst. (N. J.) Ch. R. 126.

him. If the conveyance to the owner of the clothing-mill gave him the right to enter upon the land embraced in the deed to the other grantee, it was to repair or rebuild the flume there existing, and not to erect one of different dimensions; nor was he authorized to erect one drawing more water, even if such an one might be more advantageous, and if the grantee of the grist and saw-mill, for the time being, forbore to use the water.¹

§ 149 *a*. Under a reservation in a grant of lands and water privileges of sufficient water to propel certain *specified machinery*, the grantor is entitled to the use of the water for any purpose not requiring a *greater power* than is reserved. Thus, where the owner of lands upon a mill stream granted a portion thereof, together with water sufficient to operate a saw-mill at all times, *when there should be more than enough to drive a grist-mill with three run of stones, and certain other specified machinery*; the Court held, that the grantor in the deed and those holding under him were not restricted in the use of the water to the particular objects mentioned in the deed, but might use the quantity reserved for any other purpose.² This construction is supported

¹ Dewey v. Bellows, 9 N. Hamp. R. 282. The statute of New Hampshire, relative to the repair of mills, dams, &c., owned by tenants in common, does not, on the neglect of one tenant, authorize another to erect a new mill or dam substantially different from the former, and to call on his co-tenant, under an appraisal, for contribution. Bellows v. Dewey, 9 N. Hamp. R. 278.

² Cromwell v. Selden, 3 Comst. (N. Y.) R. 253. In Luttrell's case, 4 Coke, R. 86, the plaintiff alleged that he was seised in fee of two old and ruinous fulling-mills, to which from time immemorial, *magna pars aquæ cujusdam rivuli* ran from a place called "Head Wear," that afterwards he had pulled down the fulling-mills and erected two mills to grind corn, and he complained that the defendant had diverted the water from these mills.

by *Bigelow v. Battel*,¹ in which case the plaintiffs being the owners of the entire water power of Charles River, at Natick, granted to the defendants the privilege of taking from their dam a specified quantity of water, "except when the quantity of water is so small as not to be sufficient to carry plaintiff's grist-mill, and a cotton factory which may be erected, with no more than five thousand spindles." Although it was no part of the contract that the plaintiffs should have a right to the water for the use of a *paper-mill*, it was held, that the right reserved did not limit the use of the water to a cotton factory; but that the true intent of the reservation was that the water should, at all times, be left *sufficient* to carry five thousand spindles.

§ 149 b. Upon the argument in the above case of

The plaintiff had judgment, and it was assigned for error, that by breaking and abating the old fulling-mills, and building new mills of another nature, the plaintiff had destroyed the prescription, and could not prescribe to have any watercourse to grist-mills. If a man grant me a watercourse to my fulling-mills, I cannot, it is said, convert them to corn-mills, *nec e contra*. For prescription in such case shall be intended to commence by grant, and it might be more beneficial to him who made the original grant, and to others who had his estate, to have them fulling-mills rather than corn-mills. Perhaps they have corn-mills so near that the building of corn-mills would be prejudicial to them, and it would be against reason to extend a grant or prescription to have a watercourse to fulling-mills to corn-mills, which is not within the purport of the grant or prescription. But it was resolved, that the prescription did extend to the new grist-mills; that the plaintiff might alter the mill into the nature of what mill he pleased, provided always, that no prejudice should thereby arise by diverting or stopping the water, as it was before. And see *post*, § 226, 227. Just so at the present day; lapse of time, increase of population, and improvements in mechanics, must necessarily give rise to changes, and these may occasion a necessity to *change the mode* in which the parties have been accustomed to divide water power to which they are respectively entitled, between them. *Cress v. Varney*, 5 Harris, (Penn.) R. 496.

¹ *Bigelow v. Battel*, 15 Mass. R. 313.

Cromwell v. Selden,¹ the defendant's counsel relied on Ashley v. Pease,² and Benedict v. Strong,³ as favoring an opposite construction. "It is true," say the Court, "that in both these cases, it was held that the grantee was not only limited in the quantity of water which he had a right to use, but also in the manner of using it. But each of these cases is distinguishable from that of Cromwell v. Selden. In Ashley v. Pease, the plaintiff being owner of an entire water privilege, granted and conveyed to the defendant's ancestor a fulling-mill, and covenanted with him that when there should be a sufficiency of water to carry and supply the uses of all the mills then standing, or which might thereafter be standing in their place, on the dam, he would suffer and permit him to draw from the flume "*so much water as might be necessary to carry and supply the fulling-mill then standing, or which might thereafter stand upon the lot he had granted*;" but when there was not a sufficiency of water for the purposes and uses aforesaid, then he was to draw water for the use of the said fulling-mill or mills, twelve hours successively in the twenty-four, and no more. The grantee also covenanted in the same instrument, that he would never use or occupy the fulling-mill, nor any other mill or building which might thereafter stand in the same place, so as to interfere with or obstruct the going or working of the plaintiff's saw-mill, or any other mill or building which the plaintiff might erect in the same place. The defendant erected a carding machine in the same building occupied as a fulling-mill, and used the water for the pur-

¹ Cromwell v. Selden, *ub. sup.*

² Ashley v. Pease, 18 Pick. (Mass.) R. 268.

³ Benedict v. Strong, 5 (Conn.) R. 210.

pose of running both, but not both at the same time. The Court held that it was manifest from the general tenor of the contract, that it was the intention of the parties that the grant should be limited *to the use of* the water for driving the fulling-mill, and that the use of it for a carding machine was unauthorized. That this is what the parties intended, the Court say is confirmed by the grantee's covenant not to obstruct or interfere with the plaintiff's mills, by using and diminishing the water power except to carry and supply the fulling-mill."

§ 149 c. In *Strong v. Benedict*,¹ the grant was of four acres of land, "with the privilege of building a mill for the purpose of fulling cloth, together with the privilege of drawing so much water as should be necessary to carry a good well-built overshot fulling-mill, at any time when the grantee *shall have occasion to use the said fulling-mill*." The grantee was to have so much water as was necessary *when he should have occasion to run the fulling-mill*. "It would seem, therefore," say the Court, "as if there was a limitation of the use as well as of the quantity. But without expressing a definitive opinion on this subject, it is clear, from the situation and condition of the parties, and other collateral facts known to them at the time, and which may properly be recurred to for the purpose of ascertaining their mutual intentions, that it was intended that the *use* of the water as well as the *quantity*, should be restricted." Thus it will be seen, say the Court, in *Cromwell v. Selden*,² that in the first of these cases

¹ *Strong v. Benedict*, *ub. sup.*

² *Ub. sub.*

(*Ashley v. Pease*) the covenant of the grantee himself amounted to an express prohibition of the use of the water for any other purpose than that specified in the grant; and in the other, although by the terms of the grant the defendant was only entitled to the use of the water '*when he had occasion to use the fulling-mill*,' the Court refrain from expressing 'a definitive opinion' upon the construction of the terms of the grant, but place their decision upon collateral facts known to the parties at the time, clearly indicating that it was their mutual intention that the water granted should be used for a particular object only."

§ 149 *d*. Lands were conveyed with a reservation in the following words:—"The said parties of the first part, do hereby reserve *to themselves and to their heirs and assigns*, one acre and a half of land, out of the above described premises at the south-east corner of lot No. 11, and on which the tannery is erected; and running northwardly with the highway, so as not to exceed twenty-four rods in the rear; and the said parties of the first part as aforesaid, do also reserve to themselves and *their use*, a certain well and waterworks laid down for the purpose of supplying the tannery aforesaid with water." The construction given to this clause by the New York Court of Appeals was, that the reservation of the well and waterworks, was *unlimited* in the uses to which the water might be applied, and was not restricted to the purpose of a mere tannery, and that the right would pass to the grantee of the party making the reservation.'

§ 149 *e*. The decision in the case of *Rogers v. Ban-*

¹ *Borst v. Empie*, 1 Seld. (N. Y.) R. 38.

croft, in Vermont,¹ shows an inclination on the part of the Court to construe grants of water liberally, so as to impose no unnecessary restriction upon the mode of its use; so that when the words used will admit of one construction, which would limit the use to a particular purpose, and another which would allow the use specified to be merely a measure of the quantity to be used, the latter construction is adopted; because it is more favorable to the grantee, and also to progressive improvements. But this rule of construction, the Court were of opinion, had little or no application to the following case: A. and B. were tenants in common of certain land, and of a saw-mill thereon, standing on the north side of a stream passing through the land, and of a bark-mill upon the south side,—both mills being moved by means of the same dam; and they executed at the same time partition deeds, each to the other. A conveyed to B all on the north side of the stream, without any mention of the water, or water privilege; and the deed from B to A contained this clause,—*Also the tan-yard and bark-mill, with a privilege of water for the said bark-mill, when I the said B, my heirs or assigns, do not want the water for the use of the works now standing on the said dam, or any others to be erected hereafter, that draw no more water than those now standing.* And it was held that this gave to the owner of the saw-mill a paramount right to the use of the water for his mill, or for any other works drawing no more water; but that this right was confined to works supplied with water by means of the same dam, then standing, or one substituted for it, in case of its destruction; and that it

¹ Rogers v. Bancroft, 20 (Vt.) R. 250.

did not give to B, or his assigns, the right to claim, that an amount of water, equal to what would be required for such works, should be allowed to pass over that dam and be collected in a pond raised by a dam built below, and be there used to supply mills by means of such lower dam.

§ 149 *f*. Reservations of water for a specified use are of course as much to be considered a measure of quantity, as grants. In 1824 the defendant's grantors, who were the owners of mills and water power, conveyed to the plaintiff's grantors the privilege of erecting a suitable building for the use of carding wool and dressing cloth, to be located below the grist-mill which the grantors were about to erect upon the stream, and the privilege of connecting a flume with the flume of the grist-mill, and of drawing water at all times from the flume of the grist-mill, "excepting such quantity of water as is necessary for the use of two runs of stones in the grain or grist-mill, and that, in case there is not water in the flume for the use of both carding machines and clothing works and the grist-mill, that the grain or grist-mill shall at all times have water sufficient for grinding with two runs of stones, in preference to the carding machines and clothing works." In 1825 the grantors in that deed erected their grist-mill, with three runs of stones, a corn cracker and smut-mill, which were propelled by four water-wheels; and the same season the grantees in that deed erected their clothing works below the grist-mill, and a flume, to conduct water for the use of the machinery therein, was connected with the flume of the grist-mill. In 1830 the defendant's grantors placed another run of stones in the grist-mill, and erected a machine shop adjoining the grist-mill, and attached the corn cracker

and smut-mill to the wheel of the machine shop. In 1831 the defendant's grantors conveyed to the plaintiff's grantors an additional privilege, which was described as follows:—"The farther right and privilege of drawing water from [the] grist-mill flume and pond at all times, for the purpose of manufacturing any and every kind and description of woollen, or cotton, or linen, or hemp, or silk goods, or manufactures; provided, if the said [grantees] shall draw more water from said flume and pond, than they now have a right to draw, they shall not draw such additional quantity of water from said flume and pond, so as to interfere with the privileges now belonging and reserved to the said grist-mill, nor so as to interfere with the privileges belonging to the saw-mill owned by David Stimson." And it was held, that the reservation for the grist-mill, in the first deed, defined the use of water for two runs of stones as a measure of the quantity of water to be used, and not as a restriction to that particular use; and that this was the reservation of privileges for the grist-mill which was referred to in the second deed; but that this reservation was to be understood as of the date of the second deed; and that it reserved to the grantors the right to use the quantity of water named, a sufficient portion of the time to do all the business then done in the grist-mill, or which might reasonably be then expected to be done, without essential addition to the machinery,—in no event exceeding an amount of water power that would be given by the constant use of water sufficient to carry two runs of stones.

In 1830 the defendant's grantors had also conveyed to one S. the saw-mill upon the same dam, with the privileges belonging to it, but subject to the right of

the plaintiff's grantors, under the deed executed in 1824, to use water for their clothing works, and also reserving to the grantors in that deed the first privilege of drawing water for the use of the grist-mill. In 1833, subsequent to the grant of the additional manufacturing privilege above mentioned, S. reconveyed to his grantors, by quitclaim deed, the premises and privileges conveyed to him in 1830, and the same grantors, upon the same day, executed to him another deed, conveying the saw-mill, with the privilege of drawing water from the pond for its use, when there should be more water in the pond than was wanted for the use of the grist-mill, and to carry all the machinery therein, as then used, and also making it subject to the clothing works of the plaintiff's grantors, or any other machinery that should draw no more water than had been formerly used for the clothing works, and also imposing certain other restrictions upon its use, and providing, that S. might draw "water for the use of the saw-mill and shingle machinery in manner aforesaid, and no more, nor in any other way, nor for any other purpose whatever." The title acquired by S. under this deed subsequently became vested in the plaintiff's grantors, and the saw-mill was removed, and the site remained vacant. And it was held, that the first and second grants to S. were of a *quantity* of water, sufficient to carry the saw-mill, and that the title to it having come to the plaintiffs, they might use that quantity of water to increase their manufacturing privilege, provided they did not encroach upon the rights reserved to the defendants.

And it was also held, that although the plaintiff's grantors, immediately after the execution of the deed of the additional manufacturing privilege in 1831, enlarged the building which they then occupied, and

placed in it one set of machinery for manufacturing cassimeres, and continued so to use their privilege until 1836, this was not any such election, or acquiescence in a particular use of the water, as would restrict them, in the exercise of their rights, below the fair construction of their deed. To have this effect, the grant should have been so far general, as to be wholly undefined on the face of the grant, — thus evidently looking to the use, as the grantee's own construction of his grant.

§ 150. The owner of a mill who is entitled by a grant to the use of the surplus water not required by another mill, and that only, is of course bound to shut his gate when there is not a sufficiency of water for both ; and if he omits to do so, the other mill owner may do it. But if the other mill owner undertake himself to prevent the passage of water to the mill first mentioned, he will be liable to an action should he not remove the obstruction as soon as the deficiency of water ceases.”¹

§ 150 *a*. If a proprietor of two mills in the same stream, one below the other, directs in his will, providing for the sale and conveyance by his executors, that in times of low water the two mills “should have an equal use of the water alternately ; it is not necessary to the ascertainment of the equality of the water that the lower mill should be of the very kind or capacity of the mill existing at the date of the will ; and the erection of some new factory by the owner of the lower mill does not prejudice his right to an equal quantity of the water of the stream. Therefore, the owner of

¹ *Sumner v. Foster*, 7 Pick. (Mass.) R. 32.

the lower mill has the right to recover damages for the undue use and control of the water of the stream by the owners of the upper mill. It is not at all necessary to the ascertainment of this equality, that the lower mill should be of the very kind and capacity of the mill existing at the time of the devise.¹

§ 151. In England, a local act of parliament authorized a company to enter upon lands within a manor, and to dig and search for any spring of water, and to convey the water from such springs into the town of South Shields, for the use of the inhabitants of the town, and the shipping in the harbor. It provided, that the company should not take the water from any spring, streams or ponds, so as to deprive the occupiers of the land of water for their own necessary uses, and for the cattle depasturing therein. The company were empowered to lay down pipes, &c., and the inhabitants, with the consent of the company, might obtain the water by pipes to communicate with the company's pipes, at certain charges, according to the *bore* of the pipes. It was held, that the owners and occupiers of lands within the manor were not prevented by the parliamentary act from sinking wells in such lands, though the effect might be to draw off water from the company's springs.²

§ 152. A deed which describes the premises as "a certain part of a stream of water," and mentions the two *termini* of the "part," will pass a right to the whole water which flows within those *termini*. In *Bullen v. Runnels*, in New Hampshire,³ it appeared on the trial,

¹ *Cress v. Varney*, 5 Harris, (Penn.) R. 496.

² *South Shields Waterw. Co. v. Cookson*, 15 Law J. (N. S.) Exch. 315; and as to *subterraneous* diversion of water, see *Ante*, § 109–115, *et seq.*

³ *Bullen v. Runnels*, 2 N. Hamp. R. 255.

that the early proprietors of Concord, in that State, in 1732, made a conveyance of the "whole stream of Turkey River;" and that all this stream, from its source to its junction with the Merrimack, was within their boundaries. Under that grant, mills were soon erected upon the margin of the stream, at a place where the plaintiff, at the time of the action brought, owned mills and land, derived by conveyances from the original grantee of "the whole stream of Turkey River." It further appeared, that the defendant owned land and mills situated nearer the source of the river, and to turn his machinery claimed the right to use all the water which flowed in the river. In May, 1780, one F. (under whom the plaintiff held, by a subsequent conveyance) executed a deed to one D., of "a certain part of a stream on Turkey River," viz. "beginning at the mouth of Great Turkey Pond, and so extending to the head of the lesser pond;" that within those *termini*, D. soon erected mills, where the defendants, at the time of the action, were situated; and for about forty years past, D. and his grantees, including the defendant, had both claimed and used the water in the stream to turn their machinery. The plaintiff objected, that by the deed to D. nothing passed; or, if any thing, only a fractional portion of the water between the *termini* mentioned. To this objection relating to the uncertainty of the description, Mr. J. Woodbury, who pronounced the opinion of the Court, said: "By 'a certain part of a stream,' we do not apprehend, that the grantor meant some fractional part of the whole water which run in the stream, and, not having defined the extent of that part, that the deed must be adjudged void for a patent ambiguity. On the contrary, as the grantor owned the whole length of the river, we think, that by 'a certain part,' he intended to convey a part

of the whole length ; and that this part of the whole length is defined and made 'certain,' by describing it as 'beginning at the mouth of Great Turkey Pond, and so extending to the head of the lesser pond.' All that part of the river which flows between those boundaries, was intended to be conveyed. This construction gives operation to the deed, is consistent with its language, and accords well enough with the nature of the transaction. In A. D. 1780, in a period of perilous war, such a deed would be conveyed with less reluctance, and at a smaller price ; the actual use of water was, from thinness of population, and the absence of most manufacturing machinery, very limited ; and from physical causes, the quantity of it in this river was then probably much greater. Hence, without any imputation of folly or blindness, the grantor might, for a moderate compensation, convey the use of the whole river at a place some distance above his own mills."¹

3. "*Mill and Appurtenances.*"

§ 153. In *Nichols v. Chamberlin*,² it was held, that

¹ In the early settlement of Massachusetts, mills were erected over streams of water then sufficient, but which, by the clearing of the country, have so far failed, that the mills could now be wrought but a small part of the year ; and the profits would not be a sufficient inducement to keep them in repair. To this discouragement may be added the erection of new mills in the neighborhood in more convenient situations. And as to saw-mills, the consumption of all the timber in their vicinity has rendered many of them useless. Per Parsons, C. J., in *Carver v. Miller*, 4 Mass. R. 558, (1808.) The learned Judge added, that as there had been many mills heretofore erected, which could not then be wrought with adequate profit, it would be unreasonable to enable any individual part-owner to compel his partners, in all cases, to keep their mill in repair, under the statute.

² *Nichols v. Chamberlin*, Cro. Jac. 121.

if the owner of a house builds a conduit thereto through his other land, and conveys the water by pipes to his house, and then sells the house, "with all the appurtenances," *excepting the land*, the conduits and pipes pass, together with a right to dig upon the earth for the purpose of repairing the pipes, and laying new ones, when necessary. In *Pickering v. Staples*,¹ a water right, appurtenant to a mill, passed by the word "appurtenances," which was considered as comprehensive of the water right, as if the privilege of using the water had been expressly inserted in the conveyance; even though the vendor, when he executed the conveyance, declared that he neither bought nor sold the water right.²

§ 153, *a*. There can be no doubt that a grant in which the simple term "mill site" is only used, conveys a water power, together with the right to maintain a dam, and wherever such dam would be suitable for the convenient and beneficial appropriation of the water power. The word "site" is used in judicial proceedings whenever mills and water rights are spoken of, as comprehending a fall of water suitable for the erection and use of mill-dams. Such a fall of water being denominated a "mill site," or "mill seat."³

§ 154. In *Farrar v. Stackpole*, in Maine, it was held, that by the conveyance of a saw-mill, with the appurtenances, the *mill-chain*, clogs, and bars, being in their appropriate places, at the time of the conveyance, passed. In this case, it was not denied, that other

¹ *Pickering v. Staples*, 5 S. & Rawle, (Penn.) R. 107.

² *Whitney v. Olney*, 3 Mason, (Cir. Co.) R. 280; and Post, § 156.

³ *Stackpole v. Curtis*, 2 Red. (Me.) R. 383.

parts of the machinery, intended for the operation of the mill, passed with the mill; but it was insisted, that the *chain* was of the nature of personal property, and, therefore, passed not by a deed of the realty, unless specially named. To this the Court answered, "First, that if it be an essential part of the mill, it is included in that term, whether real or personal; secondly, that that which is in its nature personal, may change its character, if fixed, used, and appropriated to that which is real. Is it too much to say, that the mill is incomplete, without a chain, a cable or other substitute? It may be, that a millwright, who contracts to erect a mill, and to furnish materials, may be deemed to have completed his engagement, without supplying a chain. One millwright, a witness in the case, testified, that such is his impression; and, if this is to be understood generally his contract might not extend further. But the owner would find that he had yet something more to procure, before he could be in a condition to operate. The chain is the last in the parts of the machinery, to which the impelling power is communicated, to effect the object in view. Its actual location in the succession of parts, can make no difference. It is, in its nature, essential to the mill, it is included in that term; and that, as it has been heretofore remarked, whether it be personal or real property. But, upon consideration, we are of opinion, that it ought to be regarded as appertaining to, and constituting a part of, the realty."¹

¹ *Farrar v. Stackpole*, 6 Greenl. (Me.) R. 154. In giving their opinion in this case, the Court further observed as follows: "There was at Bath, in this State, a saw-mill propelled by steam, generally called the steam

§ 155. By a *devise* of a mill with the appurtenances, it has been held, that a right not only to the building and use of the water, but also to the *land* which was

saw-mill. Suppose this establishment had been conveyed by the name of the steam saw-mill, without a more particular description. What would pass? There is nothing in the books with respect to this species of property; for it is of quite modern invention; and there is no other mill of the kind in this part of the country. If you exclude such parts of the machinery as may be detached without injury to the other parts or to the building, you leave it mutilated, incomplete, and insufficient to perform its intended operations. The parties, in using the general term, would intend to embrace whatever was essential to it, according to its nature and design; and the law would doubtless so construe the conveyance as to effectuate the lawful intention of the parties. Salt pans have been held to pass the realty, and to belong to the inheritance; because adapted and designed for, and incident to, an establishment for the manufacture of salt. The principle is, that certain things, personal in their nature, when fitted and prepared to be used with real estate, change their character and appertain to the realty, as an incident or accessory to its principal. Upon this ground we are satisfied that the chain in question, being in the mill at the time, and essential to its beneficial enjoyment, passed by the deed of the defendant to Asa Redington, under whom the plaintiffs claim, independent of any reference to usage. The verdict is therefore sustained, although not upon a ground in accordance with the impressions of the Judge who presided at the trial. This we think, upon the whole, a fair application of the principles of law to the case. Had the term mill, however, by uniform and general usage, been understood not to embrace the chain, a different construction would no doubt have obtained; for it is a term of art, the proper meaning of which would be fixed by the general understanding of those who are skilled and experienced in it. If they were not agreed, the law would adopt that which was most general, and which would best accord with the nature and character of the subject-matter. The jury have found, upon the evidence submitted to them, that by general and uniform usage, the chain passed by a deed of the mill. This finding was somewhat stronger than the evidence warranted. It did appear that there had been exceptions to this usage; but the weight of evidence went to support it. At any rate it is apparent that the usage is rather in favor than against the construction we have adopted. But as we are of opinion that the title of the plaintiffs is well supported by the deed, independent of usage, it becomes unnecessary to decide upon the competency or effect of the testimony adduced upon this point."

used with the mill, passed.¹ In this case, C. J. TILGHMAN said, — “No doubt there must have been also a small parcel of land adjoining. But how much, or how situated, was a fact to be inquired of by the jury. They were to inquire, not what *in their own judgment* was convenient, on a view of the mill, but what was actually used as appurtenant to it by the testator in his lifetime ; for that, and that only, would pass by the devise. If no trace of that could be discovered, by evidence of what was occupied by the testator, or by his devisee, soon after his death, then, indeed, the jury could only decide by their own judgment, what was necessary, and this they had a right to presume was intended by the testator.”

§ 156. Mr. J. STORY, in *Whitney v. Olney*,² had before him the question upon the very point, whether a devise of a mill and appurtenances, conveyed the land under the mill, and so much adjoining it, as was necessary to its use, and had been actually used with it. In deciding this question, the learned Judge went not upon the ground, that the land was a mere appurtenance to the mill, but that it was a parcel thereof. He admitted it to be true, that land cannot strictly be appurtenant to land, so as to pass under the term “appurtenances ;” but, said he, *where the intention is clearly expressed*, that the land should pass under that name, the law would give effect to the grant, notwithstanding the mis-nomer. He then cites Plowden, to show that where it is averred in pleading, that certain land was appertaining to a messuage, although, in point of law,

¹ *Blaine's Lessee v. Chambers*, 1 S. & Rawle, (Penn.) R. 169.

² *Whitney v. Olney*, 3 Mason, (Cir. Co.) R. 280.

it could not be appurtenant to the messuage, was nevertheless well in a grant, because it shall be intended to mean such land as is usually occupied with the messuage; and, therefore, a devise of a messuage, "with the lands to the same appertaining," is good to pass such lands as have been commonly occupied, used, or lying with the messuage. If this be true, continues the learned Judge, in a *grant*, the law will construe the words still more favorably in a *devise*. But in the case before him, he laid no stress upon the words "with the appurtenances," but held, that the land under the mill, and adjacent thereto, passed simply by the force of the word "mill." Both in common sense, and legal interpretation, he observed, a mill does not mean merely the building in which the business is carried on, but includes the site, dam, and other things, connected with the freehold.¹

§ 157. The "saw-mill," without any further description, was set off by the commissioners appointed to divide an estate, to one of the claimants. The Court held thus: "Doubtless by this term, the fee of the land upon which the mill stood would pass."² Lord Coke enumerates a variety of terms, which, being used in a conveyance, carry lands; and he states to what extent.³ The land passes, because included in the term used. The word mill, or *molendinum*, is not among

¹ *Land appurtenant to land*, in *Leonard v. White*, 7 Mass. R. 6, the question was, whether under a grant of a mill, with the privileges and appurtenances thereto belonging, the soil in a way passed which had been immemorially used for the purpose of access to the mill from the highway. The Court held, that the soil did not pass, but that the way, as an easement, might be appendant or appurtenant to the mill.

² *Blake v. Clark*, 6 Greenl. (Me.) R. 436.

³ Co. Litt. 4, b.

those to which he adverts; and probably no authority can be adduced, in which it has been held to convey, *ex vi termini*, any part of the adjoining land. That upon which it stands may be regarded as including land, over and upon which the slip, if it has one, or any other necessary projection from the mill, passes. The term may embrace the free use of the head of water, existing at the time of the conveyance, as also a right of way."

§ 157 *a*. By a testator in his will: "I give and devise to my son W., his heirs and assigns, the houses, mills, and races which he now possesses, together with twenty-four feet from the mill to the dam to enable him to repair the race at pleasure, together with full and free liberty to keep the dam in repair, so as to furnish water to the mill devised to him;" and by a subsequent clause in his will, the testator devised the land through which the race and twenty-four feet were, to his grandson, without reservation. It was held, that the devise to the son of the twenty-four feet along the race, vested in him a fee simple estate in the soil, and not a mere easement.¹

4. *Secondary Easements.*

§ 158. The maxim of the law is, that whoever grants a thing, is supposed also tacitly to grant that, without which the grant would be of no effect;² and accordingly, whenever any thing is granted, all the means to attain it, and all the fruits and effects of it, are granted

¹ *Harlan v. Moore*, 9 Watts, (Penn.) R. 360.

² *Cuicumque aliquis concedit concedere videtur, et id sine quo res ipsa non potuit*, 11 Rep. 52.

also, and will pass inclusive, together with the thing by the grant of the thing itself, without the words *cum pertinentiis*, or with appurtenances, or any like words.¹ Hence the rule, that by a grant of a piece of ground, there is also granted a right of way to it over the grantor's land, as incident to the grant; and so it has been observed, that, when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use; as if a man gives to another a license to lay pipes of lead in his land, to convey water to his cistern, the grantee may afterwards enter, and dig the land, in order to mend the pipes, though the soil is still in the grantor.² In a very modern case, in England, it was held, that a certain coal-shoot, water, and other pipes, all which were found by special verdict, to be necessary for the convenient and beneficial use and occupation of a certain messuage, did, under the particular circumstances, pass to the lessee, as integral parts of such messuage; and it was further held, that the right of passing and repassing over the soil of a certain passage, for the purpose of using the said coal-shoot, and using, clearing, and repairing the said pipes, likewise passed to the lessee, as a necessary incident to the subject-matter actually demised, although not specially named in the lease.³ In the case of the *United States v. Appleton*,⁴ reliance was placed on the

¹ See *Evans v. Rees*, 12 Adol. & Ell. R. 57; *Shep. Touch.* 81; *Broom's Legal Maxims*, 198; and see *Co. Litt.* 307, a; *Hathorn v. Stinson*, 1 Fairf. (Me.) R. 224; *Oakley v. Stanley*, 5 Wend. (N. Y.) R. 523; *Taylor v. Hampton*, 4 McCord, (S. C.) R. 96.

² Per Twysden, J., *Pomfret v. Rycroft*, 1 Saund. R. 323; *Hodgson v. Field*, 7 East, R. 622.

³ *Hinchliffe v. Earl of Kinnoul*, 5 Bing. (N. C.) R. 1.

⁴ *United States v. Appleton*, 1 Sumner, (Cir. Co.) R. 491.

language of the grant, "with all the ways," &c. But this was held by Mr. J. STORY, to be wholly unnecessary; for whatever, said he, are properly incidents and appurtenances of the grant, will pass without the word "appurtenances," by mere operation of law.¹ A grant of a right to build a dam, carries with it a right to enter and repair the dam, and cleanse the pond.² It was contended in *Kent v. Waite*,³ that a right of way which had been acquired by prescription, did not pass by a deed of the land, without the words *cum pertinentiis*; but the Court held otherwise.

§ 159. Agreeably to the above doctrine, a water right which has been used with a mill, together with all secondary easements, will pass by a grant of the mill, without the words "with the appurtenances."⁴ Mr. J. BAYLEY puts the illustration,—"Suppose the owner of two fields sells one, having a stream of water flowing through it, can the vendee stop the water-course? *Prima facie* no exception in the conveyance could be presumed."⁵ So in the converse case, the law gives a common-sense construction, and supposes, that each field has the appurtenances thereof in *statu quo*, notwithstanding the grant.⁶ A grantor conveyed by

¹ See also *Grant v. Chase*, 17 Mass. R. 443; *Hazard v. Robinson*, 3 Mason, (Cir. Co.) R. 272; *Preble v. Reed*, 5 Shep. (Me.) R. 169.

² *Fraily v. Waters*, 7 Barr, (Penn.) R. 221.

³ *Kent v. Waite*, 10 Pick. (Mass.) R. 138.

⁴ *Pickering v. Staples*, 5 S. & Rawle, (Penn.) R. 107; *Swartz v. Swartz*, 4 Barr, (Penn.) R. 353; *Vermont Central Railroad Co. v. Hills*, 23 Vt. R. 681.

⁵ *Canham v. Fisk*, 2 Tyrwhitt, R. 155.

⁶ Per Mr. J. Story, in *U. States v. Appleton*, 1 Sumn. (Cir. Co.) R. 501. A, the owner of a tract through which a stream of water runs, and on which a mill was erected, purchased of the *supra-riparian* owner, the right of diverting the water, by means of a dam, of the height of any former

deed a tract of land, described by metes and bounds, with a mill upon the same; and, at the time of the conveyance, there was a raceway to conduct the water from the mill, running along the side of the natural stream, beyond the land granted, into other land of the grantor, and there discharging the water into the natural stream. The raceway had been used with the mill several years, and was necessary to the convenience of it. It was held, that a right to have the water flow off through the whole extent of the raceway, passed, as appurtenant to the mill.¹ The "saw-mill," without other description, was assigned to one of the heirs to an estate, and it was decided, that the use of the water, and any easement used with, or necessary to its enjoyment, passed.² The term "dam," in a grant of land, with a stream of water running through it, and on which there is a dam, flume, and conductor, is construed as including the flume, or as being of equivalent import.³ In these, and in all cases of a grant of water right, there is implied by the grant, all such use of the land, as is necessary for the enjoyment of the right granted."⁴

dam. A then sold part of his land on the stream below the point of division. It was held, that, as against his grantee, A has the right to divert the whole of the stream, for the use of his mill, and for that purpose to erect a dam higher than that stipulated for in the grant, by the *supra-riparian* owner. *Frey v. Whitman*, 7 Barr, (Penn.) R. 440.

¹ *New Ipswich Woollen Factory v. Batchelder*, 3 N. Hamp. R. 190.

² *Blake v. Clark*, 6 Greenl. (Me.) R. 436.

³ *Kennedy v. Scovil*, 12 Conn. R. 317.

⁴ *Conwell v. Brockhart*, 4 Mun. (Ken.) R. 584. The grant of a saw-mill, "with a convenient privilege to pile logs, boards, or other lumber," conveys an easement in the land used for piling. *Thompson v. Prop's. of Andover Bridge*, 5 Greenl. (Me.) R. 62. An injury to the raceway is an injury to the mill. *Butz v. Shrie*, 1 Rawle, (Penn.) R. 281. *Wetmore v.*

§ 160. In *Dyer v. Depui*, in Pennsylvania,¹ the question was, under a grant of water, in respect to the right of entering upon land, as being included in the grant. J. D., who was the owner of a large tract of land, conveyed a part of it to the plaintiff, "together with the privilege of a part of the water flowing along a certain ditch or watercourse, flowing from J. H.'s line, through and across the said J. D.'s other land, on condition that the said M. D., (the plaintiff,) his heirs and assigns, will at all times be subject to, and defray one half the expense of keeping or repairing the dam, and clearing out the said ditch or watercourse." There had existed previously to this deed on the land of J. D. a dam, by which the water was diverted to that part of it sold to the plaintiff. J. D. afterwards died, having by his will devised to S. D., (his son,) a tract of land, being between the plaintiff's land, and the defendant's, "together with a drain or watercourse, from J. H.'s line, through and across the lot of land hereinafter devised to my son J. D.," (the defendant,) "as the same now runs, with a privilege on each side of the drain or watercourse, one perch in width, for the purpose of passing and repassing to mend and repair and clear out the said drain or watercourse, as often as the same may be necessary, and without any let or hindrance of him the said J. D., his heirs or assigns," "with the water drain and privilege aforesaid, to him the said S. D., and his heirs and assigns, subject to the water

White, 2 Caines' Ca. 87; *Blake v. Clark*, 6 Greenl. (Me.) R. 436; *Strickler v. Todd*, 10 S. & Rawle, (Penn.) R. 63; *Hall v. Benner*, 1 Penn. R. 402; *Rackley v. Sprague*, 5 Shep. (Me.) R. 281; *Maddox v. Goddard*, 3 Shep. (Me.) R. 218; *Moore v. Fletcher*, 4 Shep. (Me.) R. 63.

¹ *Dyer v. Depui*, 5 Whart. (Penn.) R. 584.

drain now open and running through and across the first mentioned lot, to M. D.'s line." He then devised to the defendant, J. D., another portion of land, adjoining and "subject to the aforesaid drain or watercourse, from J. H.'s line, through and across the first-mentioned lot of land, with the privilege granted to my son S. D., his heirs and assigns, of a passage or court-way, one perch wide, on each side of said drain, for cleansing or repairing the same." It was held, that the right conveyed to the plaintiff by the deed of J. D. was not restricted to the watering of cattle, but that it was a right to use a portion of the water in the way it was customary and necessary to use it for the benefit of the land conveyed; and that, if to do so, it was necessary to conduct it on or along the defendant's farm by a trench, if that was the only way in which he could beneficially use the privilege, he might cut the trench to conduct the water, and might renew and repair the dam for the purpose. The Court considered, that the grants and liabilities evinced the clear understanding and determination of the testator, that the drain was to subsist and remain *in perpetuum* as a matter of importance to the enjoyment of the properties by the respective owners.

§ 161. In a division of real estate, under the statute of descents, if a mill-site is assigned to one of the heirs, he or she takes it with the easements and privileges before attached to it, and with which it had been used. Where A. died intestate and seised of a tract of land on which there was a grist-mill then in operation, and on a division of the land, under the Maryland statute of direct descents, amongst his heirs, the mill was on the part allotted to B., and the dam of which covered a portion of the part allotted to C., it was held, that B.

had a right to use the mill and dam in the same way, and to the same extent, as they had been used by A, in his lifetime. The dam, said the Court, was appurtenant to the mill, and if the intestate had conveyed the mill with the appurtenances, it could not be contended that he could have sustained an action against the purchaser for the injury in question; and if he could not, it was difficult to perceive on what principles a suit could be maintained against the assignee of the mill by the other heir; and the assignee of the mill could not be supposed to stand in a worse situation than a purchaser would have done. Besides, it was the duty of the commissioners, (and it was to be presumed they did,) in dividing the estate of the intestate, to take into consideration all the advantages and disadvantages attending the respective parts; and it was presumable that they gave to the part allotted to the heir to whom was assigned the land covered by a portion of the dam, an equivalent for the injury and inconvenience occasioned by the mill-dam.¹

§ 162. The owner of land, through which a stream of water passed, had erected thereon a grain-mill, and had raised near it a dam to furnish a water power to drive the mill, and also further up the stream, had erected another dam to preserve water for the use of the mill below, and afterwards had built a shingle-mill on the lower dam near the grist-mill, which was driven by the same water power. He then, *first* granted to the plaintiff the grain-mill and the land whereon it stood, "with the privilege of drawing water from the mill-pond sufficient for this or any other grist-mill that

¹ Kilgour v. Ashcom, 5 H. & Johns. (Md.) R. 82.

may be built on the ground that this mill stands on, the grist-mill having the privilege of drawing water over every other machinery on the dam ;” *secondly*, he granted to the defendant the shingle-mill and the land whereon it stood, “with the privilege of water sufficient for a shingle saw-mill at all times, except when the water is so low that the grist-mill will require it all, and then the shingle-mill must stop, and not till then.” *Thirdly*, he conveyed to the plaintiff the land on which the upper dam had been erected. It was held, that the defendant acquired the right to the use of the water from the upper as well as from the lower dam, when it could be taken without injury to the rights previously granted to the plaintiff for the use of the grist-mill ; that the defendant had the right to draw water for the use of his shingle-mill, whenever such drawing did not thereby injure the plaintiff in the use of his grist-mill, although there were “reasonable grounds” to believe the water would be needed for the use of the grist-mill ; that when the grant of the right of water for the use of the shingle-mill was made in express terms, there was granted, by operation of law, the right to use the means necessary to the enjoyment of the right : and therefore, by the grant to the defendant, he had the right to enter upon any land then owned by the grantor, when and where necessary, to enable him to obtain his just supply of water. The principal grounds in this case upon which the denial of the right of the defendant to claim water from the upper dam, rested, was that the upper dam was erected to reserve the water for the grain-mill ; that it was wholly owned by the owners of that mill ; and that the defendant, by the conveyance to him, acquired no interest in it. But the Court considered, that these

positions, if admitted, did not authorize the conclusion, and that when the grantor of the land and stream erected the upper dam to preserve the water for his grain-mill, the whole head of water, for whatever purpose created, became "a common fountain of life" to *any* machinery to which it might be his pleasure to impart it.¹

§ 163. In *Prescott v. White*, in Massachusetts, it was held, that where one is the owner of an ancient mill, to which there has been attached a raceway, being an artificial canal, for conducting off the water, and without the free and unobstructed current of which the mill could not be worked, and such canal has, from time immemorial, passed through the land of another, and there is no grant or contract regulating the rights of the parties, the owner of the mill has a right to enter upon the land, through which the raceway passes, and to clear out the obstructions therefrom in the mode, if any, hitherto practised for clearing out the raceway; otherwise, in the usual and ordinary mode of clearing such canals, doing no unnecessary damage.² But there is obviously a material difference between such a case, and that in the same Court, of *Prescott v. Williams, administrator*.³ The jury in the latter case found, that the stream of water passing through Prescott's land was a *natural* watercourse, and not an artificial raceway or canal, as was assumed in the trial of the former case, which materially changed the features of the case, and presented the inquiry, whether the existence of an easement, in the land conveyed, of a mill owner above,

¹ *Elliott v. Shepherd*, 12 Shep. (Me.) R. 371.

² *Prescott v. White*, 21 Pick. (Mass.) R. 431.

³ *Prescott v. Williams, Adm'r*, 5 Met. (Mass.) R. 429.

in a natural stream passing through such land, accompanied by the farther fact, that such mill owner above had for more than thirty years, as occasion and necessity required, entered upon the land conveyed, to remove obstructions in the stream, — *shows such an encumbrance upon the premises conveyed*, as to subject the grantor of such premises, who conveys them with the usual covenants of warranty and against encumbrances, to an action for a breach of his covenants. It was held, that the existence of the right in the mill owner to remove the obstructions of the free flow of the water from the mill was not an encumbrance within the meaning of such covenants.¹

¹ In this case, Dewey, J., in giving the judgment of the Court, considered it somewhat remarkable, that there should be found so little direct authority bearing upon the interesting question involved; and he relied upon general principles, as follows: "Now we find it stated in books of authority, that 'the express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment of the principal one.' Gale & What. on Easem. (Amer. ed.) 231. So also, 'in the civil law, the right to a servitude drew with it a right to such secondary servitudes as were essential for its enjoyment.' Ib. Again, it is said, that 'by the civil law, the owner of the dominant tenement had a right to do whatever was requisite to secure to himself the fullest enjoyment of his servitude.' Ib. 232. 'But in entering upon the neighboring soil for the purpose of doing these necessary works, the owner of the dominant tenement was bound not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labors might have caused to the servient tenement.' Ib. 235. The decision of this Court, in the case of the present plaintiff against White, already referred to, (21 Pick. 341,) seems to have recognized and adopted fully the principle, that where the use of a thing is granted, every thing is granted essential to such use. Such a right carries with it the implied authority to do all that is necessary to secure the enjoyment of such easement. There are other well-settled legal principles, that have a bearing upon this question. The duty of making repairs, and the labor necessary for keeping the watercourse in a state fit for use, rests wholly upon him who claims an easement on his neighbor's land; and, as a general rule, easements impose no obligation upon those

§ 164. In 1777, A received a lease of land on a watercourse opposite the site of a saw-mill about to be erected, with 'the privilege, to him and his heirs, of flowing and building the dam over a part of the lessor's land, during the duration of the saw-mill. In 1809, A conveyed to his son B a tract of land on the same watercourse, including a pond and the saw-mill connected with it, together with a piece of land below, on which a fulling-mill was afterwards erected. In May, 1815, A conveyed, with covenants of warranty, to C, his heirs and assigns forever, the latter piece with the fulling-mill thereon, and the appurtenances thereunto belong-

whose lands are thus placed in servitude, to do any thing. Gale & What. on Easem. 215; Taylor v. Whitehead, 2 Doug. R. 745. The owner of the land below, through which the stream passes, being thus free from all *obligation* to cleanse the stream, or remove any obstructions that may arise without fault on his part, and which may impede the free passage of the water; if the right to cleanse such watercourse, or remove such obstructions, rests exclusively with him, the consequences will be, that the same may never be done; and whether done or not, will depend upon the will or caprice of the owner of the land below, who may have no interest in the matter, rather than upon the wishes of the owner of the mill above, whose interests may be deeply affected by it. We are satisfied that in the present case the owner of the mill privilege above, having this natural easement in the land below, would, independently of any right acquired by compact or by prescription, have a right to enter upon the land below, and in a reasonable and proper manner do all acts necessary to secure the enjoyment of his easement. This right to enter upon the land of another, to cleanse a natural stream, or remove any casual obstructions therein, is one doubtless to be held to the strictest and narrowest limits compatible with the enjoyment of the principal easement. It is to be considered as a privilege arising from the necessity of the case, and, like a way of necessity, to be enjoyed only when the party has no other reasonable and suitable mode of effecting this object. It is to be done in such a manner as shall cause no unnecessary damage to the owner of the land below. The encumbrance, occasioned by the easement in the present case, does not appear, by the evidence relied upon to establish the nature and extent of it, to be other and different from the secondary easement embraced within the principles we have stated."

ing, for carrying on the fulling business ; granting also to C certain privileges reserved by A, to himself and heirs, in a deed of adjoining land previously sold by A to R ; granting also to C the privilege of supplying himself with water for the use of the fulling-mill, at all times, from the saw-mill dam, whenever it should be wanted for carrying on his business ; C to have ingress and egress through the road laid across the grantor's land to the public highway ; *habendum* to C, his heirs, &c. In June, 1815, B released to A his interest in the fulling-mill site, as deeded by A to C. The water of the saw-mill pond had always been used for the fulling-mill, and was, in fact, essential to its enjoyment. The dam of the saw-mill pond becoming leaky, D, the heir of C, after a fruitless application to B to repair it, took stones and earth from the bed of such pond, for this purpose, doing no unnecessary damage. In an action of trespass *quare clausum fregit*, brought by B against D, for such act, it was held, *first*, that the privilege granted to C was not a mere personal privilege to him, but extended to his heirs and assigns ; *secondly*, that the release from B to A inured to the benefit of C, not only as to the land and fulling-mill, but also as to the privilege granted by A to C ; *thirdly*, that the lease to A in 1777, limiting the privilege therein granted to the duration of the saw-mill, had no effect upon the construction of A's deed to C ; *fourthly*, that C, having, by the express terms of A's deed to him, the privilege of supplying himself with water, was empowered to do those acts, which were necessary to obtain a supply ; and consequently the act complained of was rightfully done.¹

¹ *Miller v. Scholfield*, 12 Conn. R. 335.

§ 165. In short, under the grant of a thing, whether it be water or any thing else, whatever is parcel of it, or of the essence of it, or necessary to its *beneficial* use, or in common intendment is included in it, passes to the grantee.¹ But the doctrine, in its application to water rights, must be understood as applying to such things only as are incident to the grant, and *directly* necessary for the enjoyment of the thing granted. If, for instance, a person grant to another the fish in his ponds, the grantee cannot cut the banks to lay the ponds dry, for he may take the fish by nets or other engines.² Again, if a person, upon a lease for years, reserve a way to himself, through the house of the lessee to a back-house, he cannot use it but at seasonable times, and upon request.³ A way of necessity to a watercourse would be, therefore, limited to the necessity which created it, and when such necessity ceases, the right of way will also cease; and if at any subsequent period, the party formerly entitled to such way can, by passing over his own land, approach the place to which it led, by as direct a course, as he would have done by using the old way, the way ceases to exist as of necessity.⁴

§ 166. The distinction between what is *necessary*, and what is merely *convenient*, or desirable, in the class of cases above considered, was taken in *Howell v. M'Coy*.⁵

¹ Per Story, J., in *Whitney v. Olney*, 3 Mason, (Cir. Co.) R. 272.

² 1 Wms. Saund. 232, n. 6; and see *Hodgson v. Field*, 7 East, R. 613.

³ *Tomlin v. Fuller*, 1 Ventr. R. 48; and see also *Morris v. Edginton*, 3 Taunt. R. 24, cited 6 M. & Welsb. R. 189; *Wilson v. Bagshaw*, 5 Man. & Ry. R. 448; *Osborn v. Wise*, 7 C. & Payne, R. 761; Broom's Legal Maxims, 201.

⁴ *Holmes v. Goring*, 2 Bing. R. 76.

⁵ *Howell v. M'Coy*, 3 Rawle, (Penn.) R. 256.

In that case, there was a lease of a piece of ground for a tan-yard, with the use of so much of the water of a stream as might be necessary for conducting the business of tanning ; and it was held, that this did not give to the lessee the privilege of emptying the contents of the tan-yard into the stream. The Court in this case were clear that the rule was, that whatever is claimed as passing as an appurtenance must be necessary to the enjoyment of the thing devised, and not merely convenient. It would be extremely convenient if the party possessed the right asserted, of emptying the contents of his tan-yard on the stream below, or disposing of his surplus tan in the land *adjoining his land*, but that this was necessary was a matter of doubt. There were *various ways* of disposing of the matter of the tan-yard, and it was for the grantee to consider of this at the time of the demise. If the grantee did not choose to purchase more land, it was certainly not the fault of the grantor.

5. *Lex Loci.*

§ 167. If water flows to a mill in another State, and the use *becomes annexed to it*, the use and the title are both governed by the laws of the State in which the mill is situated. In *Slack v. Walcott*,¹ which was a proceeding in equity to establish the title to the use of water for the plaintiff's mill, STORY, J., in giving judgment, said : "The mill in controversy is situated in Massachusetts ; the river, the use of whose waters is claimed as appurtenant to the mill, is the boundary of the two States, and the waters, therefore, partly flow

¹ *Slack v. Walcott*, 3 Mason, (Cir. Co.) R. 508.

in each State. The right, however, is not a distinct right to the water, as *terre aqua coöperta*, or as a distinct corporeal hereditament, but as an incident to the mill, and attached to the realty. It passes by a grant of the mill, and has no independent existence. It is not real estate situated in Rhode Island. It is an incorporeal hereditament annexed to a freehold in Massachusetts; and a conveyance of the mill, good by the laws of the State, where the mill is situated, conveys all the appurtenances. The wrong done by stopping the flow of the water by any obstruction or drain in Rhode Island is an injury done to the mill itself in Massachusetts. In a just sense, the wrong may be said to be done in both States, like the analogous case of an injury to land lying in one county by an act done in another county. The devisee is entitled to the remedy also by the laws of Massachusetts as the owner of the mill. His title, when unimpeachable by the law of Massachusetts, does not by the general principles of public law require any new probate in Rhode Island. It could receive no new validity from such probate. It could lose none without it. Suppose an ancient house situate on the boundary line of a State, and a person in the adjacent State obstructs its ancient lights, would it be contended, that the right to use such ancient lights was real estate in the adjacent State? And if the title were derived by grant, or by will, would it be contended, that a registry of the deed or a probate of the will would be necessary in each State before any redress could be obtained by the owner? If necessary at all, it would be equally so, whether the suit were brought in one State or the other. In such a case, if the law respecting grants or wills were different in the different States, a purchaser might right-

fully succeed to the propriety of the house, but lose its ancient privileges. The public law, which declares, that the title to real estate can pass only according to the law of the place, where it is situated, supposes the thing to be tangible and fixed, and the *situs* clearly intraterritorial. But where is the *situs* of an incorporeal right? The right to flowing water is no more real estate, than the right to flowing air or light. The very nature of these things forbids durable, fixed, and absolute territorial possession. It is true, that a State has jurisdiction over the waters of the rivers, which flow within its boundaries, and may, by its laws, regulate the title, enjoyment, and use of them awhile, and so long as they flow within its boundaries. But its authority stops here; the right to the use of the same waters, when they flow beyond its boundaries, is not within its control. The title is not acquired under the laws of such State. If the waters flow to a mill in another State, and the use becomes annexed to it, the use and the title are exclusively to be governed by the laws of the latter State. What authority has Rhode Island to control the water which flows to a mill in Massachusetts? The right to the use of such water, whether it be deemed real or personal estate, is a right exercised under the jurisdiction of Massachusetts, and is to be governed by its laws. Rhode Island might indeed refuse to recognize in her Courts the title to such property, unless it passed in some special manner prescribed by her laws; and so she might the title to lands in Massachusetts coming incidentally in question in her Courts. But this would not change such title, or give the State a right to annul it. It would be a refusal of that national comity and justice, which the civilized world is accustomed to allow for great public

purposes of policy and convenience. Beyond this the authority would have no operation. There is no pretence to say, that Rhode Island has as yet legislated to such an extent. Her laws for the probate of foreign wills go no farther than to provide for such cases, where they affect property lying or being within the State.'

6. *How Easements in Watercourses are created.*

§ 168. The ceremony required by law for the creation of easements, and all incorporeal hereditaments, is a *deed, devise, or record*; and as the same ceremonies are requisite in the transfer of a right as are requisite in its original formation, a water right, as an incorporeal hereditament, can only be assigned by deed, devise, or record. Lord COKE says: "And here is implied a division fee or inheritance; viz., into corporeal, as lands and tenements which lie in livery, comprehended in this word feoffment, and will pass by livery, by deed, or without deed; and incorporeal, which lie in grant, which cannot pass by livery, but by deed, as advowsons, commons, &c.; and the deed of incorporeate inheritance doth equal the livery of corporeate. Grant, *concessio*, is properly of things incorporeate, which, as hath been said, cannot pass without deed."¹ In Gilbert's Law of Evidence,² it is laid down, — "If a man shows title to a thing lying in grant, *he fails if the seal be torn off from his deed*; for a man cannot show a title to a thing lying in solemn agreement, but by solemn agreement; and there can be no solemn agreement without

¹ Co. Litt. 9, a.

² P. 96, 6th edit.

a seal, so that possession alone is not sufficient, since the thing itself does not lie in possession, but in agreement; therefore, a man cannot claim title to a water-course *but by deed and under seal*." With the position of Lord Chief Baron Gilbert, that the party fails, if the *seal be torn off the deed*, the case of *Bolton v. The Bishop of Carlisle*¹ is at variance; as in that case it was decided, that if the deed be destroyed, other evidence may be given to show that the thing was once granted. The general position, however, that a man cannot claim title to a thing lying in grant, but by deed, was not questioned in the case."

§ 169. The case of *Fentinam v. Smith*,² is clear and positive in its language. The plaintiff, in that case, claimed to have a passage for water, by a tunnel, over the defendant's land, and Lord ELLENBOROUGH lays it down distinctly: "The title to have the water flowing in the tunnel over defendant's land could not pass by parol license, without deed, and the plaintiff could not be entitled to it as stated in his declaration, by reason of his possession of the mill, but he had it by license of the defendant, or by contract with him; and if by license, it was revocable at any time." In *Hewlins v. Shippam*,³ where the question was whether a right to a drain running through the adjoining land could be conferred by a parol license, and under the statute of frauds; in an elaborate judgment delivered by the Court, it was held, that such an interest could only be created by deed. The doctrine laid down in this case

¹ *Bolton v. The Bishop of Carlisle*, 2 H. Black. R. 259.

² *Fentinam v. Smith*, 4 East, R. 109.

³ *Hewlins v. Shippam*, 5 B. & Cress. R. 221.

was fully recognized in *Cocker v. Cowper*,¹ where an action was brought for stopping up a watercourse. It appeared from the award of the arbitrator, that the channel in question consisted of a drain and tunnel, which had been constructed on the defendant's land by the plaintiff, in the year 1815, with the verbal consent only of the then tenant and of the defendant, and that

¹ *Cocker v. Cowper*, 1 Cr. Mees. & Ros. R. 418. And the same has been decided by prior authorities, in reference to different easements, as *Monk v. Butler*, Cro. Jac. 574, where the plaintiff in replevin answered an avowry for *damage feasant* by a plea of license from a commoner who had right for twenty beasts; it was objected, that, if the commoner could license, he could not do so without deed, and of that opinion was the whole Court. So in *Hoskins v. Robins*, 2 Vent. R. 128, an objection was taken to such a license on account of its not being stated to be by deed, and although the objection was overruled on the ground, that, after verdict, it must be taken that the license was by deed, yet the Court were unanimous in thinking that such a license could not be granted without deed. So, in *Harrison v. Parker*, 6 East, R. 154, where liberty and license were given to the plaintiff and his heirs to build a bridge across a river, from the plaintiff's close to the close of A, and liberty and license to plaintiff to lay the foundation of one end on A's close, the grant was by deed. The right to be buried in a particular vault, was held in *Bryan v. Whistler*, 8 B. & Cress. R. 298, to be an easement which could be created by deed only. A legal right of way cannot pass except by deed. Per Lord Denman, C. J., in *Tickle v. Brown*, 4 Adol. & Ell. R. 369. The questions as to what are deemed interests in land or otherwise, within the statute of frauds, have arisen in England in a variety of cases relating to rates and water-companies. Tolls have not been held ratable as real property, (*Rex v. Eyre*, 12 East, R. 416,) unless where connected with some tangible real property, as sluices, engines, or the like. *Rex v. Cardington*, Cowp. R. 582. So pipes laid in the ground for the conveyance of gas, have been held to come within the denomination of real property. *Rex v. Brighton Gas Co.* 5 B. & Cress. R. 466. And on the same principle, pipes for the conveyance of water have been held to constitute an interest in land, (*Rex v. Bath*, 4 East, R. 609;) and the reservoir with the water would all descend to the heir. *Ibid.* Shares in water-companies have also been deemed real estates, (2 P. Wms. R. 127; 1 M. & Sel. R. 634; 5 B. & Ald. R. 156; 2 Ves. R. 182; 2 Dick. R. 545); unless, as is usually the case, provision is made by act of the legislature for making the shares personalty. See *You. & Coll. R.* 281. And see 1 Crabb, Real Property, § 88.

the water had flowed through it up to the year 1833, when, upon the plaintiff's refusal to pay for the use of the water, the defendant diverted the channel. It appeared perfectly clear to the Court of Exchequer that the plaintiff was not entitled to recover. "With regard to the question of license," said the Court, "the case of *Hewlins v. Shippam*, is decisive to show that an easement, like this, cannot be conferred unless by deed."¹

§ 170. Such, it has positively been decided, is the law in this country; and, in this country, an owner of land may have granted to his neighbor a right of way by parol, and even on a valuable consideration, and the neighbor may have enjoyed it for a very considerable length of time; and although it may be very unjust for the owner or his assignee, with a knowledge of these facts, to repudiate the grant and cut off the way; yet if he will, he may, because *ita lex scripta est*.² Therefore, the claim of a right to enter upon the land of another, to repair a dam and embankment, necessary to the working of a mill, and originally erected with the consent of the owner of the soil, cannot be

¹ See also *Williams v. Morris*, 8 M. & Welsb. R. 488.

² Per Shaw, C. J., in *Fitch v. Seymour*, 9 Met. (Mass.) R. 462. And see *Chapin v. Noyes*, 6 Wend. (N. Y.) R. 461. An instrument was of the following tenure:—"I hereby authorize R. to open, and continue open a road through my field, beginning, at, &c., as also to build, keep in repair, and use a bridge over the branch in the field in which the said road will pass; said road and bridge being intended as well for the public use, as for the use of R.; and to continue until R. and myself shall agree it shall be shut up or altered." This, executed under the hand and seal of the owner of the land, is a grant of an incorporeal hereditament, and which must be *acknowledged and recorded* agreeably to the acts of registration. *Hays v. Richardson*, 1 G. & Johns. (Md.) R. 866. The same doctrine was maintained in *Wright v. Freeman*, 5 H. & Johns. (Md.) R. 467.

maintained without deed.¹ And the doctrine has been, in this country, applied directly to water-rights.² Thus in *Bullen v. Runnells*, in New Hampshire,³ the deed described the premises as "a certain part of a stream of water," and it was held, that whether all the interest in the soil beneath the water passed for every purpose, or whether it passed only so far as was necessary for the use and enjoyment of the water, the interest was of such a character, that, under the statute of frauds of that State, it could not be conveyed without a deed duly executed and recorded.

§ 171. In *Thompson v. Gregory*,⁴ the Court say, "It is not necessary to examine whether the witness was or was not competent, because, assuming him to have been so, his testimony would have been of no avail, since the right in question could not pass by *parol*. The right reserved by the lease to the grantor, and his heirs and assigns, *to erect mills or dams*, was an incorporeal hereditament. It was not the land itself, but a right annexed to it, and it could only pass by grant. The appropriate subject-matter of grants is these incorporeal rights, of which livery cannot be had, and a grant is, in general, good only by deed. This was the rule of the Common Law; and were it otherwise, no such interest could be *assigned* or *granted*, without writing, according to the express provision of the statute of frauds." Even a written declaration in-

¹ *Cook v. Stearns*, 11 Mass. R. 538.

² *Russell v. Scott*, 9 Cow. (N. Y.) R. 279. See *Curtis v. Jackson*, 13 Mass. R. 517; *Anon v. Deberry*, 1 Hayw. (N. C.) R. 248; *Hull v. Chaffee*, 18 Verm. R. 150.

³ *Bullen v. Runnells*, 5 N. Hamp. R. 255.

⁴ *Thompson v. Gregory*, 4 Johns. (N. Y.) R. 81.

dorsed on a lease after the date, by the lessor, that he intended to demise a greater interest in the use of the water than the lease expresses, is not operative, it has been held, to convey any interest.¹

§ 172. A grant of the right of flowing land, without paying damage, as provided by statute, is an easement and an interest in land, and can only be made by deed. In a case in Massachusetts, A orally requested B to erect a mill-dam, and orally promised him, that if the dam should flow his land, he would not claim damages for the flowing; and accordingly B built a dam and mill, and flowed A's land; and afterwards conveyed the dam and mill to C, who continued to flow the land. To recover damages from C for this flowing, A entered a complaint against him, and it was decided, that he had waived his right to damages by his agreement with B, and could not recover. But A afterwards conveyed his land to D, with a covenant that it was free from all encumbrances, and D brought an action against him for a breach of this covenant, alleging the right of C to flow the land without payment of damages. It was held, that C had no such right as against D, by virtue of A's oral agreement with B; and that no breach of the covenant was shown. In giving the opinion of the Court, SHAW, C. J., said, "The grantee of a right, privilege, or easement in land, must secure it in the manner the law provides; otherwise the law will not guarantee it to him."² A claim for mere damages caused by flowing land by means of a mill-dam, may undoubtedly be *waived* by

¹ Russell v. Scott, 9 Cow. (N. Y.) R. 279.

² Fitch v. Seymour, 9 Met. (Mass.) R. 462.

parol; inasmuch as it is always a good defence to a claim for a sum of money, that it has been paid, or satisfied by agreement, or waived; and proof of payment, satisfaction, or waiver, may be made by parol."¹ This is, however, different from a permanent right, privilege, or easement in another's land, which is a much more important interest, and which, by the Common Law, and by the statute of frauds, cannot pass without writing.

7. *Reservations and Exceptions of Water Rights in Grants of Land.*

§ 173. An easement may also be *reserved* in a deed of conveyance of the land, or *retained* by an exception in such deed; and, as where an easement is granted, whatever is essential to the enjoyment of it passes to the grantee, so in a reservation or exception of an easement, every thing is withheld by the grantor which is essential to its enjoyment; for, notwithstanding a deed contains the words *grant*, &c., such words are to be limited by the general tenor of the context, the subject-matter, and more especially by the express declaration or intent of the grantor contained in the deed itself.² A person may, therefore, accept a deed from a riparian proprietor on a watercourse, in which there is reserved or secured to his grantor an easement, with the privileges secondary thereto, in the premises; and by the use of the words "brook to

¹ *Seymour v. Carter*, 2 Met. (Mass.) R. 520. And see Post, Chap. VIII., in which the subject of *parol licenses* is fully considered.

² *Wade v. Howard*, 6 Pick. (Mass.) R. 492; *Cocheco Manuf. Co. v. Whittier*, 10 N. Hamp. R. 305.

remain to the use of the proprietor forever," if the volume of water has been for many years artificially increased for the use of the mills, it is forever so to remain; the soil passes to the grantee, the grantor reserving the right to the use of the water, as formerly.¹

§ 174. In order to ascertain what is granted in the case of an *exception* in a deed, it must first be ascertained what is included in the exception; for whatever is included in the exception, is excluded from the grant.² The words *exception* and *reservation* are often used indiscriminately, though there is a distinction recognized between them. An exception is separating part of that embraced in the description, and already existing in specie; as excepting a particular parcel of land from a farm granted by general words. A reservation is something newly created, out of the granted premises, by force and effect of the reservation itself, as an easement out of land demised.³ The effect of the deed, it has been said, does not depend upon the use of the one or the other of these terms, but on the facts which they represent.⁴ In *Case v. Haight*,⁵ a party who owned land on one side of a stream, and

¹ *Vickerie v. Buswell*, 1 Shep. (Me.) R. 289.

² *Greenleaf's Lessee v. Birth*, 6 Peters, (U. S.) R. 310; *Case v. Haight*, 3 Wend. (N. Y.) R. 632.

³ Per Shaw, C. J., in *Hurd v. Curtis*, 7 Met. (Mass.) R. 94. An exception is always a part of the thing granted, but a reservation is of a thing not in esse, but newly created or reserved. Per Parker, C. J., in *Cocheco Manuf. Co. v. Whittier*, 10 N. Hamp. R. 305, referring to Co. Litt. 47, a; Shep. Touch. 80; *Cutler v. Tufts*, 3 Pick. (Mass.) R. 272; *Jackson v. Smith*, 9 Johns. (N. Y.) R. 100.

⁴ Per McLean, J., in *Bowman's Devisees v. Wathen*, 2 McLean, (Cir. Co.) R. 766.

⁵ *Case v. Haight*, 3 Wend. (N. Y.) R. 362, (Court of Errors.)

also the bed of a stream, conveyed to another party owning land adjoining the stream on the other side, the land under water to the middle of the stream, reserving to himself the right to butt a dam on both sides of the stream as he should think necessary; it was held, that the reservation had not the effect of an exception, it being indispensable to a good exception, that the thing excepted should be part of the *thing granted*, and not of any other thing; that the parties were entitled to an equal participation of the use of the water, notwithstanding the reservation. The reservation was, however, held to be operative as an *implied covenant*, or by way of *estoppel*, securing the right provided for in the reservation.

§ 175. It is laid down, that an exception must be of a particular thing out of a general one, and must be described with certainty.¹ If the exception be not set down with precision and accuracy, as if one grant a house, excepting one chamber, or grant a manor, excepting one acre, but does not designate what chamber, or which acre, the exceptions are void.² A description in a deed of a certain tract of land, excepting one acre, which is retained for the use of flowing water, is void for uncertainty.³

¹ See Co. Litt. 142, a.

² See *Darling v. Crowell*, 6 N. Hamp. R. 421, and the authorities there adduced.

³ *Ibid.* In *Hull v. Leonard*, 1 Pick. (Mass.) R. 81, it is said, if a grant be made to a father and his son, and the father has several sons, it is void; and so if made to a man's cousin. And it was held in the case just cited, that a grant to the heirs of an individual, is void for uncertainty. In a devise of a house, "reserving, however, two rooms of said house, for the use and during the life of W., I desire by this fourth article, that the widow W. may have the choice of those two rooms which shall best suit her, because I desire the said W. should be sure of a shelter during the time

§ 176. An exception or reservation, of something which the premises granted do not comprise, is void, as having nothing to operate upon.¹ Where the owner of an acre of land adjoining a river, and upon which one end of a dam abutted, conveyed the land by metes and bounds, and the water privilege, reserving to himself the privilege of drawing such a portion of water from the pond, as he might have occasion for, for fulling skins; and it appeared that there was no mill in existence there for such purpose, and that the grantor owned no other land in the vicinity; but there was other land adjacent owned by third persons, upon which a fulling-mill might with convenience be erected, and the water conducted through the premises conveyed; it was held, that a right to erect a mill upon the land conveyed was not included in the reservation. There was nothing about the erection of a building upon the land, or any possession of it, except so far as the drawing of water from the pond was concerned. If the party at the time had been the owner of the land adjoining, upon which he had erected, or was then erecting a fulling-mill, there would have been no doubt as to the meaning of the parties. The Court, in fact, said, that if the party had been at that time the owner of the land immediately adjoining the acre conveyed, upon which a mill might conveniently have been erected, it could hardly have admitted of a question.²

she may live,"—it was held, that this reservation vests in W. an estate in the two rooms for life, of which she may make any disposition. It does not create a mere easement for her personal use. *Wasthoff v. Dracourt*, 3 Watts, (Penn.) R. 240.

¹ *Hurd v. Curtis*, 7 Met. (Mass.) R. 94.

² *Cocheco Manuf. Co. v. Whittier*, 10 N. Hamp. R. 305.

§ 177. In *Hurd v. Curtis*,¹ A conveyed to B, by deed of release, a parcel of land, "with a paper-mill privilege on the premises, and flooms, watercourses, dams, right of way and passage, with the right of water for one paper-mill with two engines, being one of the six paper-mill rights and privileges established and agreed upon by certain articles of agreement," referred to; said conveyed paper-mill privilege "to be entitled to all the rights, and none other, and subject to all the restrictions, terms, and conditions" in said articles of agreement contained. A also, in the same deed, granted, assigned, and conveyed to B "all the rights, privileges, benefits, and interest in and to the exceptions and reservations which said A excepted and reserved by his deed to C" of a prior date: By said prior deed of A to C, A conveyed to C a parcel of land, "together with a paper-mill privilege, with the flooms, watercourses and dam, to the same belonging, with the right of water for one paper-mill with two engines, being one of the six paper-mill rights and privileges established and agreed upon by certain articles of agreement," [the same which were referred to in A's deed to B,] "*except* the reserve of the right and privilege of conveying water through the premises hereby granted and conveyed, in the channel now open, in which water used to run to a saw-mill; for the purpose of carrying such water works as he (A) may wish to erect on his premises adjoining the premises hereby conveyed, with the right of widening said channel, not exceeding sixteen feet, and of deepening the same," &c. *Held*, that A's grant to B of the rights, privileges, benefits, and

¹ *Hurd v. Curtis*, *ub. sup.*

interest, in and to the exceptions and reservations which A excepted and reserved in and by his deed to C, did not enlarge the water power and privilege released to B in the former part of A's deed to him.

§ 178. Still, as there was occasion in the preceding part of the work to state,¹ if it be the intention of a grantor of land, covered by a watercourse, to withhold the water from the grantee, he may easily do so by the use of proper words in the instrument of conveyance to that effect. On the same principle, and by the same means, he may impose in his own favor and for his own purposes, any conditions and limitations, and restrictions in the use of the water by the grantee.² Thus, the grantor of a tract of land, without having mentioned a watercourse included within the prescribed limits, declared it to be the understanding of the grantor, and the intention of the deed, to convey to the grantee as much of the privilege of the water as should be sufficient for the use of a fulling-mill, whenever there was a sufficiency therefor; and it was held, that this clause was not repugnant to the grant, but was a good reservation of the surplus water.³ In this case, it was urged, that the whole of the stream passed by the conveyance of the land, and that the restraining clause, being subsequent, was void for repugnance, whether considered in the light of an exception or reservation, or as an explanation of the preceding

¹ Ante, § 9; *Claremont v. Carleton*, 2 N. Hamp. R. 371; *Haye's Ex'r v. Bowman*, 1 Rand. (Va.) R. 420; Note to *Jennings, ex parte*, 6 Cow. (N. Y.) R. 548; Opinion of Kent, C. J., in *Palmer v. Mulligan*, 3 Caines, (N. Y.) R. 319. As to a reservation of the water by bounding in a particular manner on a watercourse, see Ante, § 17 - 44.

² *Pettee v. Hawes*, 13 Pick. (Mass.) R. 323.

³ *Sprague v. Snow*, 4 Pick. (Mass.) R. 54.

words of the conveyance. The Court admitted, that the principle on which the objection rested was correctly stated, but were clear it did not apply to the instrument of conveyance in question. The doctrine advanced by the Court was, that if there be an explicit and unambiguous grant of a thing, any exception or reservation, which is manifestly contradictory, is to be rejected; as if a man conveys twenty acres, excepting one; or where the conveyance is construed to be of a moiety, and in a subsequent clause, the grantor said, that he meant to convey a fourth part; which was obviously contradictory and to be rejected.¹

§ 179. By a grant of a mill, it has been seen,² the land under the mill, and adjacent land necessary for its use, passes by the force of the grant; and so it is *eo converso*, if a mill is excepted or reserved in a grant of a tract of land, the land upon which it stands, and adjacent land necessary for its use, will *not* pass. Thus, where land was conveyed, with all the buildings standing thereon, *except* the "brick factory," it was held, that the grantor's title to the land on which the factory stood, and the water privilege appurtenant thereto, did not pass by the deed; for, as the Court say, "when property is granted, all that is necessary for the enjoyment of the grant is impliedly granted, as incident to the express grant; and the same rule of construction applies to an exception in a grant."³

§ 180. So, an exception of a particular mill-site operates as an exception of the soil of the mill-site (just

¹ Cutler v. Tufts, 3 Pick. (Mass.) R. 272; and see Platt on Cov. 313, *et seq.*

² Ante, § 157.

³ Allen v. Scott, 21 Pick. (Mass.) R. 25.

as a grant of a mill-site will convey the soil;) and so much land as is necessary for the *mill-pond*, and for erecting and carrying on the business of the mill; and such a reservation is not of a mere easement, but of the soil itself.¹

§ 181. A general reservation of all watercourses on the demised premises, suitable for the erection of mills, together with the right of 'erecting mills and other works thereon, with a certain number of acres of land adjoining thereto, will give to the lessor a right to all the mill-sites, whenever he chooses to make a location; it is the same as reserving all the mill-sites on the demised premises, with the number of acres of land specified."² But such a reservation or exception extends only to natural mill-sites, and not to artificial ones, such as where water is brought to the land by means of sluices.³

§ 182. If two persons, being tenants in common of a lot of land embracing a mill privilege, make partition of the lot by mutual deeds of release, and in each of the deeds make a reservation "of one half of the mill privileges on said land, with the right of using the same," the effect is to divide the land, but to leave the mill privileges in common as before; and where such owner of half the mill privileges on the whole lot conveys to a third person certain mills not in controversy, and also conveys in the same deed "one half of all the water for a grist-mill, *on said lot*, below the mills before mentioned," the grantee takes one half of all the water,

¹ Jackson v. Vermilyea, 6 Cow. (N. Y.) R. 77.

² Russell v. Scott, 9 Cow. (N. Y.) R. 299; Butz v. Ihrie, 1 Rawle, (Penn.) R. 281.

³ Jackson v. Lawrence, 11 Johns. (N. Y.) R. 191.

if so much be necessary, for the use of a grist-mill to be erected below the mills then existing.¹

§ 183. If a proprietor of land, on which are a mill and mill privilege, grant to one son the use and benefit of one half of a saw-mill, and on the same day, grants to another son a tract of land, including that whereon the mill stood, "excepting the privilege of one half of a saw-mill conveyed to the other son, and *his heirs* ; the grant and the reservation are to be considered together, to ascertain the intention of the parties ; and one half of the mill and mill privilege, pass by the grant.²

§ 184. Where the premises in a deed were described "a certain grist-mill and bank, wherever the same is situated, with the appurtenances thereof, lying, &c. and adjoining a bridge crossing a river ;" it was held, that the bank between such grist-mill and bridge on which a carding-mill stood, was conveyed by such deed ; but that a *reservation* in such deed of the "building adjoining on the east end of the mill," wherein the carding machine was then in operation, with the use of water for certain purposes, and on certain conditions, included the mill only, and not the land on which it stood ; and that the right so reserved was also restricted to the buildings then existing, and did not extend to any other building subsequently erected on the same site ; the Court said, "The intention of the parties is obvious, and the terms of the grant are too plain to admit of a doubt. Were they otherwise, they are to be taken most strongly against the grantors."³

¹ Bailey v. Rust, 3 Shep. (Me.) R. 440.

² Moore v. Fletcher, 4 Shep. (Me.) R. 68.

³ Marshall v. Niles, 8 Conn. R. 361.

§ 185. For the purpose of ascertaining what parties really intend, by a reservation in a grant of a watercourse, it is undoubtedly proper to take into consideration the condition of the property, and the circumstances of the parties. Such was the view taken by the Court in *Kennedy v. Scovil*, in Connecticut.¹ In that case, it appears, that in June, 1822, and before, B. owned two pieces of land, with a watercourse running through both of them, and on each side of which he had a mill propelled by the watercourse. On the upper piece he had a dam, mill-pond, flume, and conductor; and the water for the use of both mills passed from the dam through the flume. For the use of the upper mill, the water was taken from the flume by means of two orifices in it; and for the use of the lower mill, the water was taken by the means of a conductor inserted in the flume, and extending from it to the mill. On the 8th of June, 1832, B. conveyed to S. the upper mill-site, and one half of the pond flowed by the dam, by a deed containing the following clause: "Always provided, and this deed is given on condition that the grantor is to have and retain the privilege of conveying water from said dam through a conductor similar to the one now in use, till the same shall arrive at the *east* end of the new shop, [the upper mill,] and thence, either by a conductor, race, or otherwise, to the shop [lower mill] lying *east* of the new shop." The rights of B. in the lower mill afterwards became vested in K. and S.; K. owning two thirds, and S. one third. In November, 1835, S. made a new orifice in the flume, lower than any former one, and

¹ *Kennedy v. Scovil*, 12 Conn. R. 317.

thereby drew off so much of the water as not to leave sufficient to keep the lower mill in operation. It was held, that B., at the time of the conveyance from him to S., had a right, and was bound to take the water for the use of the lower mill in the accustomed manner, and that, by such conveyance, B. retained to that mill all the privileges which it then enjoyed; and that the term "dam" in the reservation was to be construed as including the flume, or as being of equivalent import.

§ 186. Where A. let a fulling-mill, together with the watercourse and flood-gates to a trustee for ninety-nine years, if either his daughter or wife should so long live, for their use, and in order to make provision for them; with an exception of free liberty for the lessor, heir, &c., his servants and tenants, at all times, to divert the water from the mill for watering all meadows which they should think proper, and to put up and take down all proper sluices; and part of the profits of the mill consisted of water rents for flooding meadows, with water which was wholly diverted from the mill; it was held, that by the exception, the heir of the lessor was entitled to the water rents, the exception not being repugnant to the grant.¹

§ 187. An exception in a grant in these words, "excepting and reserving out of the said piece of land so much as is necessary for the use of a grist-mill on the east side of the road, at the west end of the saw-mill dam," is held to be a good exception; although until the grantor or his assigns exercised the right reserved and built the mill, it was inoperative, so that the whole premises so far vested in the grantee as to

¹ *Lambert v. Bennet*, 8 Smith, R. 84, in K. B., Geo. 3.

enable him to maintain trespass against a stranger ; or even against the grantor and his assigns, for an entry on the land for any purpose other than that specified in the reservation.¹

§ 188. An absolute power of revoking the easement of taking and using water for hydraulic purposes *reserved* in a demise thereof, is not invalid as being repugnant to the demise ; and the easement may be resumed at any time. The canal commissioners in the State of New York, demised to one M. the right of taking and using, for hydraulic purposes, the water which should flow from a waste weir at a prescribed height, so far as the same might be taken without interfering prejudicially with canal navigation ; *reserving* the right to the State *wholly to resume* the subject of the demise at any time the commissioners should think fit, without being liable in damages, or to make compensation for improvements and erections. The lessee transferred all interest in the lease, and the assignee had erected and nearly completed an expensive flour-mill on the premises, when the commissioners caused the waste weir to be raised beyond the height mentioned in the lease. It was held by the Supreme Court of that State, that the power reserved in the lease extended as well to a *partial* as to a *total* resumption of the privilege demised ; and that the act of raising the waste weir was, under the terms of the reservation, lawful. Neither was any formal opinion on the part of the commissioners, as to the necessity

¹ Dygert v. Mathews, 11 Wend. (N. Y.) R. 35. The case of Thompson v. Gregory, 4 Johns., (N. Y.) R. 81, was a reservation of a right to flow, but was within the principle of the case just before cited. And see Provost v. Calder, 2 Wend. (N. Y.) R. 517.

of resuming the subject of the demise, requisite as a preliminary to the exercise of the right of resumption.¹

§ 189. An instance of an *implied* reservation was where E. mortgaged a strip of land, including mills thereon, and running a distance along the river; but three years afterwards, having sold a small portion of the mortgaged premises for a hide-mill and lime vats, he obtained a release from the mortgagee for a nominal consideration, of what he had sold, described thus: "Beginning at the end of a dam, running up the river two rods, and so round to the bank of the river." The mortgagee afterwards having foreclosed, one question was, whether the release gave a right to the centre of the river; and it appeared, that if it was to have that effect, it would destroy the value of the mortgagee's mill privileges. The Court held, that it was not to be inferred that the mortgagee intended to release every thing valuable in the mortgaged premises, for which a large consideration had been given; and they considered the release in question, under all the peculiar circumstances, as being no more than a mere exception in the mortgage; and that it excluded any part of the stream.²

§ 190. In a case in Pennsylvania, it appeared that W. S., the father of J. S., had purchased a tract of land, and in 1797, or 1798, erected a mill, and diverted a watercourse from its natural channel into the mill-race, by means of a dam erected on that part of the tract which, at the time of the action commenced, was owned

¹ Miller, *ex parte*, 2 Hill, (N. Y.) R. 418.

² Hatch v. Dwight, 17 Mass. R. 289.

by the defendant. This race had been used with the mill, since the time of its erection. In 1813, W. S. made his will, whereby he directed the mill and twelve acres of land to be laid out adjoining for its use, to be sold to pay debts and legacies; "*the right and privilege of the water to remain unmolested and entire for the benefit and use of the mill, whoever may hereafter own said mills.*" The residue of the farm, excepting twenty-eight acres previously "*let*" to his son A. S., he devised to his son J. S., and directed him to pay the purchase-money due on the whole tract. J. S. (the plaintiff) had occupied and used the mill and race, and *cleared* the latter, when necessary, since the death of his father in 1813, and had repaired the dam which diverted the stream when necessary. On the 21st February, 1831, the plaintiff, by a deed recorded, conveyed twenty-eight acres, parcel of the larger tract, with its appurtenances, to A. S., with a covenant of seisin, and that the same was clear of all encumbrance. In 1836, A. S. conveyed to trustees, who, in the same year, conveyed to the defendant. When J. S. conveyed to A. S., without expressly reserving the water right, he left room for a question whether he could show it to have *been impliedly reserved by parol*. It was held, that a purchaser from A. S. had notice of a parol reservation of the right to the race, from the fact of the subsequent occupation of the mill, and user of the race by J. S. It was settled, said GIBSON, C. J., that a trust was not within the statute of frauds of Pennsylvania; and that the statute was docked of those sections of the English statute which require declarations of trust to be put in writing.¹

¹ *Randall v. Silverthorn*, in error, 4 Barr, (Penn.) R. 173. An *implied* reservation: If the owner of land build houses upon it, adjoining

8. *Unity of Possession.*

§ 191. The strong resemblance between the prædial servitudes of the Civil Law and the easements of the Common Law, has already been pointed out.¹ One other respect in which they are alike, is, they become extinguished by *unity of possession*; or, in other words, the servitude or easement becomes extinguished when the estate to which it is due, and the estate owing it, are united in the same person. The language of the Civil Law is, “*Servitutes prædiorum confunduntur, si idem utriusque prædii dominus esse cœperit.*”²

each other so as to require mutual support, there is, either by presumed grant or by presumed reservation, a right to such mutual support, and such right is not affected by subsequent sub-division of the property. No man who becomes possessed of one of the houses by any means whatever, can be in a situation to say to his neighbor, — “You are not entitled to the protection of my house. I will pull it down, and let the houses on each side collapse and fall into the ruins of my own.” Pollock, C. B., and the rest of the Court were of this opinion. *Richards v. Rose*, Law Journ. Rep. Vol. XXIII, of the New Series, January, 1854.

¹ See Ante, § 141 – 144.

² 1 Kauff. Mack. 350. The Civil Code of Louisiana has the following provisions on the subject of the extinction of servitudes:

ART. 801. Every servitude is extinguished, when the estate to which it is due, and the estate owing it, are united in the same hands. But it is necessary that the whole of the two estates should belong to the same proprietor; for if the owner of one estate only acquires the other in part, or in common with another person, confusion does not take effect.

ART. 802. If the union of the two estates be made only under a condition, or if it cease by legal eviction; if the title be thus destroyed, either by the happening of the condition or by legal eviction, the servitudes revive, which in the mean time will have been rather suspended than extinguished. Thus the exercise of redemption, the happening of the condition on which the estate terminates, the eviction from a succession by a nearer heir, the abandonment or relinquishment of an estate on account of mortgages, will revive all the servitudes, active and passive.

ART. 803. Confusion takes place by the simple acceptance of an inherit-

So it is an established rule of the Common Law, that every easement becomes extinguished when the

ance, if there be but one heir. If the heir who has thus accepted an inheritance, disposes of any estate belonging to the succession, which is subject to any servitude towards his estate, without any stipulation for the preservation of his right of servitude, the estate thus alienated, which owed the servitude, remains free from it, in consequence of the confusion which had taken effect while the estate remained in his hands.

ART. 804. But if the heir, under a simple acceptance, sell to a person the whole of his rights in the succession he has received, the sale prevents the confusion, and the estate belonging to the succession will continue to have the rights of servitude previously due to it, or be charged with the servitudes imposed on it, in the same manner as if it had not passed through the hands of the heir ; because, in this case, the purchaser is not presumed to have purchased more or less than all the ancestors possessed.

ART. 805. Confusion does not take effect if the heir has only a temporary possession of the estate, subject to the servitude, or enjoying it for the purpose of delivering it to another person to whom it has been bequeathed, or when his right in it terminates at a certain fixed time.

ART. 806. If the heir has accepted the succession under benefit of inventory, the confusion does not take effect ; and if the heir is obliged to abandon the succession at the instance of the creditors, the servitudes resume their former state.

ART. 807. The acquets, which the husband and wife make during the marriage, do not become confused with the private property of each ; and if these acquets are sold during the marriage, the servitudes, active and passive, which existed previous to their being acquired by the husband and wife, continue to exist, without any stipulation to that effect.

ART. 808. Except in the cases herein mentioned, and similar cases, servitudes extinguished by confusion do not revive, except by a new contract ; with the exception of continuous and apparent servitudes, with respect to which the disposition made by the owner of both estates is equivalent to a title.

ART. 809. The renunciation or abandonment of the land extinguishes the servitudes charged on it, of whatever nature they may be, because the owner of the estate to which the servitude is due, is bound to accept the abandonment, which produces in his hand a confusion which puts an end to the servitude.

ART. 810. It is not necessary to produce a discharge of the servitude, that the proprietor of the estate which owes it, should abandon the whole estate ; it suffices, if he abandon the part on which the servitude is exercised.

two estates, the one claiming the easement and the other owning it, are united in the same hands ; or when both pieces of ground become the property of one owner.¹ Then the special kind of property which the right to the easement conferred, so long as the tenements belonged to different owners, are merged (*et tunc moriuntur*)² in the general rights of property.³ This doctrine was discussed as far back as the reign of Henry VII., when it was held that “if a man hath a stream of water which runneth in a leaden pipe, and he buys the land where the pipe is, and *cuts the pipe*, the water-course is extinct, because he thereby declares his intention and purpose that he does not wish to enjoy them together.”⁴ In *Nicholas v. Chamberlain*, before cited,⁵ it appeared that if a person erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, the conduits and pipes pass with the house. Here it will be observed, the right to the easement was not destroyed by the unity of possession, and for the reason that it was annexed to the messuage, and in use at the time of the grant ; and, as in the preceding case, the pipes had not been *cut off*. If the conduit and pipes had been actually severed before the grant, there then could be no pretence for saying that the conduit and pipes passed as appurtenances. The case of *Morris v. Edgin-*

¹ Co. Lit. 813, a.

² Gale & What. on Easem. 553.

³ 1 Crabb. Real Property, § 425.

⁴ Lady Brown's case, cited in *Shury v. Pigott*, Popp. R. 170, Palm. R. 446.

⁵ Ante, § 153.

ton,¹ though different in its circumstances, has been considered to establish in its reasoning the foregoing conclusion.

§ 192. The above doctrine has been applied in this country in the following case: A owns an upper mill, and B a lower mill, on the same stream. The lower mill has a dam, which obstructed the free use of the upper mill. B lowers his dam two feet, and allows it to remain in that state for thirty-eight years; and during that period the upper mill is free from obstruction. B then sells the lower mill to A, who afterwards sells it to C. The Court decided, that, on the ground of unity of possession, the right of raising the dam two feet was gone, and that the upper mill had acquired a right to use the water without back-flowing.²

§ 193. The right to a *natural* watercourse, it has been held,³ is not extinguished by unity of possession in any case, and this arises from the necessity of the case and the nature of the subject.⁴ This was settled, after a very elaborate discussion, in *Shury v. Pigott*.⁵ That was an action for stopping a watercourse which had been used to have its current run into the plaintiff's yard, and fill a pond with water, and it was held, that a unity of possession of the land of the house and place to which, and of the land through which, &c., was no bar; and there is, said WHITELOCKE, J., "no differ-

¹ *Morris v. Edginton*, 3 Taunt. R. 24; and see the Opinion of Story, J., in *Hazard v. Robinson*, 3 Mason, (Cir. Co.) R. 172; *Perry v. Parker*, 1 Woodb. & Minot, (Cir. Co.) R. 280; *Manning v. Smith*, 6 Conn. R. 289; *Grant v. Chase*, 17 Mass. R. 448.

² *Hazard v. Robinson*, 3 Mason, (Cir. Co.) R. 172.

³ See Ante, § 141.

⁴ 3 Kent, Comm. 448.

⁵ *Shury v. Pigott*, *ub. sup.*

ence between a way or common and a watercourse. These begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land; this is extinct by unity, because the greater benefit shall drown the less. A watercourse doth begin *ex jure naturæ*; having taken this course naturally, it cannot be diverted.”¹ This case was accurately examined, and deliberately confirmed in all its parts,² in *Hazard v. Robinson*;³ and Mr. Chitty, in considering this subject, remarks, “That there is a peculiarity relating to a claim of this nature, viz., that it never is destroyed by unity of seisin of the land and water, and of the place in respect of which the use of the water was claimed; the law admitting an exception on account of the uncontrollable nature of water; and that the claim to water is not strictly by grant or prescription, but *ex jure naturæ*.”⁴

§ 194. But can any thing of absolute necessity to a building, a *gutter*, for example, in the soil of another, to carry off water, be extinguished by unity of ownership? The above case of *Shury v. Pigott* distinguishes watercourses and ways of necessity from other ways and easements which do not become thus extinguished; “and if,” says PARKE, B., “it is necessary to the safety of a house, that water should flow down a drain, the right of watercourse through it is reserved by impli-

¹ In the report of this case in Latch, R. 53, it is said, — “Rent shall be extinguished by unity, and also a way, because it does not exist *durant* the unity; but it is otherwise of a thing which exists notwithstanding the unity;” and a case of warren is cited from Year Book, 35 Hen. f. 55, 56.

² 3 Kent, Comm. 448.

³ *Hazard v. Robinson*, *ub. sup.*

⁴ 1 Chit. Gen. Pr. 215. The same law recognized in *Tucker v. Jewett*, 11 Con. R. 311.

cation in every grant of the house ;” and many other cases, says he, recognize the distinction taken in *Shury v. Pigott*. In that case, DODDRIDGE, J., puts the way of necessity on the same footing as a watercourse or gutter; and, says Mr. B. ALDERSON, “its principle seems to be, that nothing of absolute necessity to the tenement is extinguished by unity of possession.”¹

§ 195. It is an expression not uncommon, that ways of *convenience* are extinguished by unity of possession, but *ways of necessity* are not; but, as it has very properly been said, “it appears to be more correct, as well as more in accordance with the general principles of the law of easements, as recognized both by the English and the Civil Law, to consider all easements, whether of convenience or necessity, as extinguished by

¹ *Pheysey v. Vicary*, 16 M. & Welsb. R. 484. In this case, A, being a termor of land, built two houses on it. The whole was then released to him in fee, “with all ways, easements, advantages, and appurtenances thereunto belonging, or therewith usually used, leased, held, occupied, and enjoyed.” By his will, he devised one house, and the appurtenances thereunto belonging, to B, and the other to C, in similar terms. During A’s ownership of both, the entrance from the high road to the principal door of the house afterwards devised to B, was a set-out carriage drive or sweep, entering from a high road, passing immediately in front of the house afterwards devised to C, to B’s door, and then the same point of entrance; B’s house had a coach-house opening only into the high road, and a back entrance into the same. After A’s death, C made a fence across so much of the carriage drive as passed immediately in front of his house, and across the oval garden, leaving the farther way to B’s front door by the same carriage drive open; B brought trespass, claiming the way as appurtenant to his house and garden. It was held, first, that the way as used in A’s time, *during the unity of ownership* in him, immediately in front of C’s house, did not pass to B with the house devised to him, under the word “appurtenances” in A’s will; and secondly, *comme semble*, that it did not pass as a way of necessity, whether taken in the strict sense, or as a way without which the most convenient and reasonable mode of enjoying every part of B’s premises could not be had.

unity ; but, that upon any subsequent severance, easements which previous to such unity were easements of necessity, are granted anew in the same manner that any other easement which would be held by law to pass as incident to the grant.”¹ The language of Best, C. J., fully supports this view of the law, that all ways are extinguished by unity of ownership ; and that ways of necessity are in reality new easements incident to the grant or reservation. “If,” says he, “I have four fields, and grant away two of them over which I have been accustomed to pass, the law will presume that I reserve a right of way to those which I retain. But what right ? The same as existed before ? No ; *the old right is extinguished*, and the new way arises out of the necessity of the thing. It has been argued, that the new grant operates as a prevention of the extinguishment of the old right of way, but there is not a single case which bears out that proposition, or which does not imply the contrary. By the grant a new way is created, and that way is limited by necessity.”²

§ 196. Had there been unity from time immemorial, the law would clearly imply a right of way as incident to a grant, if there existed no other means of such grant taking effect ; and it has, therefore, very naturally provoked the question, “Why should this anomaly of non-extinguishment be held to be law, when the same result can be obtained from the ordinary princi-

¹ Gale & What. on Easem. (Am. edit.) 60.

² Holmes v. Goring, 2 Bing. R. 88. Broke, in his Abridgement, says, “The way is revived ; *tamen videtur*, that it is a new way, (*nouvel chemin*).” Bro. Abr. tit. Extinguishment, fol. 15. And see to the same effect, Clarke v. Cogge, Cro. Jac. 170 ; Jordan v. Atwood, Owen, R. 121 ; Morris v. Edginton, 8 Taunt. R. 24.

ples regulating other easements of the same class ?”¹ Treating the right to a watercourse as a corporeal hereditament, or a right inherent in the land, attaching to each parcel through which the stream, in its natural course, passes ; and the right to have the water run to and from each proprietor over that of all others, as a natural easement,² each parcel is in turn a dominant tenement and a servient tenement ;³ dominant, to secure the proprietor’s own right, and servient, to secure the rights of others. If, therefore, such easement is extinguished by unity of ownership, it is *created anew* by every new division or severance of ownership ; and this consequence, it is held, necessarily results from the nature of their rights.⁴

§ 197. In *Cary v. Daniels*,⁵ it appeared that certain tenants in common of an ancient mill and water privilege erected, below their mill, a new dam and a smaller mill, on their own land ; and while they owned both mills, it was the practice, whenever the lower dam so raised the water as to obstruct the upper mill, for a workman in the upper mill to go down, over the land owned by the tenants in common, and open the waste gate of the lower dam, and thus relieve the upper mill from backwater. Afterwards each of the tenants in common, by a separate deed, conveyed his undivided part of the upper mill, and the land near it to W., in these terms : “ A certain parcel of land (described) together with an undivided ” fractional “ part of the pri-

¹ Gale & What. on Easem. (Am. edit.) 60.

² See Ante, § 90, *et seq.*

³ See Ante, § 141, *et seq.*

⁴ *Cary v. Daniels*, 8 Met. (Mass.) R. 466.

⁵ Ibid.

vilege of water creek, factory, saw-mill, dwelling-houses and other buildings situate on the premises, and of water-wheels, main geer, and main drums connected with the said factory and saw-mill, and of all the privileges and appurtenances thereunto belonging." W. conveyed all the upper land and buildings, with all the privileges and appurtenances, to C., who was one of the tenants in common. W. and D. afterwards became the owners of the lower land, dam, and mill, and W. released all his right therein to D., who abandoned the dam, and erected another for the use of the lower mill, lower down the stream, and by means thereof, threw back the water upon the wheel of C.'s mill, whereby its movements were obstructed. In a suit by C. against D. for this obstruction, it was held, that C. took the upper dam, mill, and privileges, as they existed, and were modified and appropriated by the lower dam, when the conveyance was made to W.; and that he did not acquire a right to the unobstructed flow of the water from his mill; and that D., by removing his dam lower down the stream, exercised his rights justly and without injury to C., if he thereby made only the same appropriation of the stream that was made by his dam and mill as they stood before; but that if B. raised his new dam, higher than his old dam, he was answerable to C. for the consequences. It was argued, that if the proprietors of the lower mill ever had a right to keep up their dam to the height at which it stood at the time of the conveyance, it was an easement; that it became extinct by unity of ownership; that, consequently, when they conveyed the upper mill without reserving an easement anew for their lower mill, the easement was gone. But the Court considered

that the water had been used and enjoyed at the lower dam consistently with the general rights of other riparian proprietors, and that it was not used and enjoyed as a mere easement which has been extinguished by unity of ownership, but was parcel of the estate.¹ And for the same reason, the Court held, that there was no breach of the covenant of warranty by the grantors against all encumbrances.

§ 198. Where the tenant holds by a defective title, and an easement in it by a valid title, the easement is not extinguished merely by unity of *possession*, but there must be a unity of *ownership*. In *Tyler v. Hammond*, in Massachusetts,² it was argued, that by the purchase of the tenant, the right of passage merged in the fee. "Such," said the Court, "would have been the legal effect if both rights had been derived from the same title. But the tenant had the fee and the easement by different titles, the one legal and the other defective; and there was, therefore, no merger. Nor can the tortious entry of the tenant under a defective title, claiming the fee, work a forfeiture of his legal rights, nor is he estopped to assert his rights by his having set up this defective title in defence."

§ 199. A unity of ownership may be created by act and operation of law.³ In 1832, the mayor and aldermen of Boston, being duly empowered, caused "Mill Creek," (which was a broad and deep watercourse flowed by the tide,) to be filled up and laid out as a high-

¹ See Ante, § 8, 90, *et seq.*

² *Tyler v. Hammond*, 11 Pick. (Mass.) R. 193.

³ *Wright v. Freeman*, 5 H. & Johns. (Md.) R. 467.

way ; and it was held, that the easement was taken away by act of law, and that for the disturbance or destruction of the easement, the tenant was entitled to compensation, in proportion to the injury sustained as the owner of the land.¹

¹ *Hancock v. Wentworth*, 5 Met. (Mass.) R. 446.

CHAPTER VI

OF THE RIGHT TO THE USE OF WATER, AS DERIVED FROM
PRESCRIPTION, OR FROM PRESUMED GRANTS.

1. Foundation of Prescriptive Right.
2. Grant as Presumed by Analogy to Act of Limitations.
3. Adverse Enjoyment.
4. Right acquired commensurate with the Extent of Enjoyment.
5. The Presumption as relates to Parties not in Possession.
6. Disabilities.
7. Extinction of Presumed Water Rights.
8. Public Rights.

1. *Foundation of Prescriptive Right.*

§ 200. THE existence of the evidence, which was stated in the preceding chapter¹ to be necessary to prove an actual grant of a special right to a watercourse may be inferred from a long enjoyment without interruption.² The foundation of this rule is, that mankind,

¹ See Ante, 168, *et seq.*

² A man who has been in possession of a watercourse for sixty years, may bring a bill in equity against a mortgagee, who foreclosed the equity of redemption, to be quieted in his possession, although he had not established his right at law. *Bush v. Western*, Prec. Ch. 530. See *Duke of Dorset v. Girdler*, Prec. Ch. 531; *Hillary v. Waller*, 12 Ves. 261, 266. After a long enjoyment of a watercourse by the plaintiff through the land of another, it was held by the Lord Keeper, that a grant was to be presumed, unless disproved by the other side; and the plaintiff was quieted in his enjoyment by injunction. *Finch v. Rasbridger*, 2 Vern. R. 390. So in Massachusetts, in the year 1798, when the evidence was, that at the time the town of Concord was first settled, one hundred and fifty years before the action was brought, a small stream was reserved for the use of the mill there; that its natural course was through the defendant's estate, and that he had diverted and wasted the water; the Court held, that the use of the stream to the plaintiff's mill for sixty years, without interruption, established his right. *Sullivan on Land Titles*, 273.

from the necessity and infirmity of their situation, must, for the preservation of their property and rights, have recourse to some general principle to take the place of individual and specific belief; upon which a conclusion can be formed from particular and individual knowledge.¹ The presumption is made for the purpose, and from a principle of quieting a long possession.²

§ 201. It is laid down in Bracton, that all incorporeal rights, or services, may be *acquired* by acquiescence and use, and *lost* by neglect and disuse.³ Indeed all the writers upon the Common Law of England, as well as the civilians, have recognized the principle that a right to any incorporeal hereditament may be acquired by lapse of time. This mode of acquisition has been by both denominated "prescription," which they say is founded on usage *longa, continua, et pacifica*. They also state, that every prescription supposes a *grant* once made, and afterwards lost; and that therefore nothing can be claimed by prescription, which in its nature could not have been granted. To constitute a prescription, according to the old writers on the Common Law, the enjoyment must have existed *time out of mind*; or, in other words, its commencement must be proved to have been anterior to the reign of Richard I.⁴ But in order

¹ *Hillary v. Waller*, 12 Ves. R. 261, 266.

² *Elbridge v. Knott*, Cowp. R. 215; and see 2 Stark. on Ev. 1203.

³ Bract. L. 4, c. xxxviii. s. 3.

⁴ Ibid. L. 2, c. xxii.; 1 Bl. Comm. 75; 2 Ib. 263. By the Common Law, an enjoyment to confer a title to an easement must have continued for a period co-extensive with the memory of man; or, in legal phrase, "during time whereof the memory of man runneth not to the contrary." To this expression a definite meaning was originally attached, as comprising the period elapsed since the year 1189. Now, according to Blackstone, "time of memory," has been used and ascertained by the law to com-

to make persons on the alert in guarding their rights, and to prevent disputes respecting privileges, that have been long and peaceably enjoyed, the Courts have not required positive testimony that the enjoyment commenced at the remote period we have mentioned, and have even held that *forty* years' enjoyment is presumptive evidence that the right has existed time out of mind, and consequently is a good prescription.¹ By the modern rule, which we shall next

mence from the reign of Richard I., a period adopted by analogy to the stat. 3 Edw. I. c. 29, which fixed that as the date for alleging seisin in a real action. When the shorter time of *sixty* years was fixed for a writ of right, and *fifty* for a possessory action, by 38 Hen. VIII., it has been said, that a similar extension of the statute was not made by Courts of Law, and that the time of prescription for incorporeal rights remained as before, (1st Report of English Real Property Commissioners, p. 51.) It is considered (see Gale & What. on Easem. p. 64) difficult to see upon what ground this distinction is made, as the enacting words of the two statutes are almost identical in expression, and the latter has been considered only as an addition to the former, restricting the period of prescription to sixty years, before action brought, and making no other alteration. The traces of immemorial prescription to be found in the Roman law are scanty, and the greater part of this doctrine, as now used in Germany, has been introduced by practice. The term *præscriptio immemorialis* (for which *præscriptio indefinita* is now often used) does not appear in the Roman Law, but was first employed by the glossators; the expressions by which it is denoted in the Corpus Juris, are: *vetustas, longævus usus, quod memoriam excedit, cujus origo memoriam excedit, contrarii memoria non extat*. Savigny (System, Vol. 4, Berlin, 1841, p. 481) speaks in favor of the technical expression, *tempus immemoriale*; but learned practitioners have, with more reason, recommended the term, *possessio immemorialis*, (1 Kauff. Mack. 300, n.) Every thing sanctioned by long usage was held peculiarly sacred by the Romans; and thus they regarded an old possession as in itself lawful by virtue of its long standing. On the same foundation the modern doctrine is based, viz., on the principle that the uninterrupted exercise of a right beyond the memory of man supplies the want of a legal title, and establishes the right on the part of the possessor. Ibid.

¹ Hill v. Smith, 10 East, R. 476. See also Child v. Tilsed, 2 Bro. & Bing. R. 403. From an user of thirty-five years of a ferry, the jury may presume a grant. Trotter v. Harris, 2 You. & Jar. R. 285, Exch. 1828.

proceed to consider, the period has been limited to *twenty years*.

§ 202. The extreme difficulty of giving proof of enjoyment for so long a time as that established in the earlier periods of the English law, was lessened by its being held, that evidence of enjoyment during a shorter time raised a presumption that such enjoyment had existed for the necessary period.¹ In *Bury v. Pope*,² "it was agreed, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land and makes windows and lights looking into the other's lands, and his house and lights have continued for the space of thirty or forty years; yet the other may enter upon his own land and soil, and lawfully erect a house or other thing against the said lights or windows, and the other can have no action, for it was his folly to build his house so near the other's lands;" and this doctrine appears to have been held down to the time of the passing of the Statute of Limitations, 21 Jac. 1, c. xvi.

2. *Grant as presumed by analogy to Act of Limitations.*

§ 203. The rule now practised upon, is an improvement upon the former rule; because, as it limits the enjoyment to a certain and precise period, viz., to the period limited by the statute of limitations for entry upon lands, it leaves less room for dispute. *Certainty* is one of the grand objects of the law; and it is peculiarly important in that branch of the law which concerns the conflicting claims to a watercourse.

¹ *Jackson v. Harvey*, 1 Cr. M. & Ross. R. 51.

² *Bury v. Pope*, Cro. Eliz. 118.

§ 204. That a title to any incorporeal hereditament, may be supported by an uninterrupted enjoyment for the period limited by statute for the right of entry upon land, was first laid down as law in England by Mr. C. J. WILMOT, in the year 1761. The case we refer to is *Lewis v. Price*, at *Nisi Prius*.¹ In this case, the rule just mentioned was adopted, in analogy to the Statute of Limitations, 21 Jac. 1, c. xvi. s. 1, which enacts, that no person who has any right or title to entry upon land, shall enter, but within twenty years next after his right or title shall accrue. There is no positive law, however, which says that no ejectment shall be brought, by any person who has not by himself, or by some other under whom he claims, been in possession of the estate for which the ejectment is brought, within twenty years; but as a person cannot enter, he of course cannot maintain an ejectment, which is founded on an entry supposed to have been made by the lessor of the plaintiff. So in an action on the case for the disturbance of an easement appurtenant to the estate, the plaintiff cannot recover, if there has been an uninterrupted enjoyment of it for twenty years by another person; and as twenty years' possession of land is considered a bar to an ejectment, so the possession of an easement attached to it for the same period, is by analogy deemed evidence of right in the party possessing it. Indeed, it would seem absurd to acknowledge a right to a greater interest, as having been created by an enjoyment for any given space of time, and to deny it to a lesser, as *omne major continet in se minus*.² The doctrine has not only fre-

¹ *Lewis v. Price*, 2 Wm's. Saund. R. 175.

² The case just referred to, of *Lewis v. Price*, was respecting the ob-

quently been applied in subsequent cases in England to lights, but frequently also to ways and rights of common, and watercourses, and in fact to all easements and profits arising from or issuing out of land.¹

§ 205. The case of *Bealy v. Shaw*,² has been a leading case in England, on the subject of the acquisition of an adverse right to the use of a natural watercourse; and it was decided in conformity to the doctrine above laid down. It was an action on the case, wherein the plaintiff declared that he was possessed of certain lands, mills, &c., and that a stream of water used to flow out of the river Irwell through his land, and was

struction of lights. It was said by Wilmot, J., that twenty years is sufficient to give a man title in ejectment, on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house. In the case of *Dougal v. Wilson*, *Ibid.*, which also came before Wilmot, when he was Chief Justice of the Common Pleas, the defendant attempted to show, that the lights did not exist more than sixty years, which would have been sufficient to rebut the evidence of a right by prescription. But it was answered by the Chief Justice, that if a man has been in possession of a house, with lights belonging to it, for fifty or sixty years, no one can stop up those lights. Possession, he said, for such a length of time, amounts to a grant of the liberty of making them, and is evidence of an agreement to make them. The possession of an estate, he continued, for so long a period as sixty years, cannot be disturbed even by a writ of right, the highest writ in the law; and as the tenant's possession of the house cannot be disturbed, it would be absurd that he should be disturbed in his lights.

¹ See *Darwin v. Upton*, 2 Wms. Saund. R. 175 (a); *Holcroft v. Heel*, 1 Bos. & Pul. R. 400; *Campbell v. Wilson*, 3 East, R. 294; *Daniel v. North*, 11 East, R. 371; *Bealy v. Shaw*, 6 East, R. 208; *Balston v. Bensted*, 1 Campb. R. 463; *Barker v. Richardson*, 4 B. & Ald. R. 578; *Gray v. Bond*, 2 Brod. & Bing. R. 667; *Cross v. Lewis*, 2 B. & Cress. R. 686; *Wright v. Howard*, 1 Sim. & Stu. R. 203; *Drewett v. Sheard*, 7 Car. & Payne, R. 465, and 32 Eng. Com. Law Rep. 585; *Mason v. Hill*, 3 Barn. & Adol. R. 76, and 23 Eng. Com. Law Rep., and 5 Barn. & Adol. R. 1, and 27 Eng. Com. Law Rep. 11; and see for other English authorities, *Matthews on Pres. Ev.* 296 to 316; *Gale & What. on Easem.* 64, *et seq.*

² *Bealy v. Shaw*, 6 East, R. 208.

used to work his said mills; and that the defendants injuriously widened, deepened, and enlarged certain sluices leading out of a part of the river Irwell, higher up than the commencement of the plaintiff's stream, and thereby drew off and diverted from the said river, a greater quantity of water than they had done previously, by which it was prevented from flowing to the premises of the plaintiff. The question presented to the Court was, as to the quantity of water to which the defendant was entitled, by virtue of his uninterrupted enjoyment. Lord ELLENBOROUGH, C. J., — "The general rule of law, as applied to this subject, is, that independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or alteration, but an *adverse* right *may* exist, founded on the occupation of another. And although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking and using it, have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. I take it, that twenty years' exclusive enjoyment of the water, in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of Parliament." Again, in *Balston v. Bensted*,¹ the defence intended to be set up in that case was, that the plaintiff had no exclusive right to the supply of certain water to which he laid claim, inasmuch as

¹ *Balston v. Bensted*, 1 Campb. R. 463, and Ante, § 111.

the principle on which twenty years' running water confers a right, appeared from the cases to be, that after an adverse possession for so long a time, a grant was to be presumed from the owners of the land farther up the stream. Such a grant could not here be presumed, as previously to the drain being made, probably no individual knew that the plaintiff's spring was fed by water percolating through the strata in the close¹ now occupied by the defendant. But Lord ELLENBOROUGH observed early in the trial, that "the only question was, whether the diminution of the supply of water to the plaintiff's bath had been caused by the drain being dug by the defendant; and that there could be no doubt, but that twenty years' exclusive enjoyment of water, in any particular manner, affords a conclusive presumption of right in the party so enjoying it."

§ 206. In the absence of a special custom, it has been held, that artificial watercourses are not distinguished from natural ones; and that a title may be gained by twenty years' user as well to the former as the latter.² The important case of *Arkwright v. Gell*,³ turned upon the right of the party receiving water

¹ As to *subterranean* diversion, see *Ante*, § 109 – 115.

² *Magor v. Chadwick*, 11 Adol. & Ell. R. 571.

³ *Arkwright v. Gell*, 5 M. & Welsb. R. 220, Exch. E. T. 1839. It would appear from the facts of this case, that there was no "*perpetua causa*," the flow of water being of a *temporary* nature only; it also seems by no means clear, that the easement claimed would not have imposed the obligation not only "*pati aut non facere*," but also to do something positive, to continue the mining operations. If this be so, if the flow of water could not have continued in the manner desired by the plaintiff, supposing the mines to be abandoned, it is clear that the obligation thus sought to be imposed was directly opposed to the legal constitution of easements. Gale & What. on Easem. 127. See *Ante*, § 4. .

drained from a mine, to compel the owners of the mine to continue such discharge; and the Court decided, that in that case no such right existed. The party would only have a right to use the water in question so long as it continued there; and an user for twenty years or longer time, would afford no presumption of a grant of the right to the water in perpetuity; for, such a grant would in truth be nothing more nor less than an obligation on the mine-owner not to work his mines, by the ordinary mode of getting minerals, below the level drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of the water constant, for the benefit of those who had used it for some profitable purpose. "How can it be supposed," said PARKE, B., "that the mine-owners could have meant to have burdened themselves with such a servitude, so destructive to their interests; and what is there to raise an inference of such an intention? The mine-owner could not bring an action against the person using the stream of water, so that the omission to bring an action could afford no argument in favor of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely,—a course so expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle which applies to the case of lights—to infer, from the abstinence of such an act, an intent to grant the use of the water in perpetuity, as a matter of right."

§ 207. In *Bealy v. Shaw*,¹ Lord ELLENBOROUGH, in

¹ *Bealy v. Shaw*, 6 East, R. 215.

giving his opinion, observes, that less than twenty years' enjoyment of the 'water of a watercourse, may or may not afford a conclusive presumption of right. It is very certain, that an adverse possession for less than twenty years requires *some other* proof in support of the right;¹ but although in general a grant cannot be presumed less than twenty years, yet *a license* may. Thus, an inclosure made from the waste twelve or thirteen years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by the license of the lord; and hence, ejectment cannot be brought against him as a trespasser, without previous notice to throw it up.²

§ 208. The doctrine that easements of every sort may be acquired by an adverse user, for the period of time limited by the statute of limitations for the right of entry upon land, has been adopted and been very frequently applied by the Courts of the United States. In *Ricard v. Williams*, in the Supreme Court of the United States,³ that Court declared, that it was the policy of Courts of Law to limit the presumption of grants to periods analogous to those of the statutes of limitation, in cases where such statutes did not directly apply; and that there was no difference in the doctrine, whether the grant relates to corporeal or incorporeal hereditaments. Where the right to a ferry was in question,

¹ *Rex v. Wardroper*, 4 Burr. R. 2024; and see 4 Esp. R. 69; *Ricard v. Williams*, 7 Wheat. (U. S.) R. 59. In *Haight v. Morris Aqueduct*, 4 Wash. (Cir. Co.) R. 607, it seemed to be considered by the Court, that an enjoyment short of twenty years, under particular circumstances, may create the presumption of a grant.

² *Doe d. Foley v. Wilson*, 11 East, R. 56; and see Post, Chap. VIII.

³ *Ricard v. Williams*, 7 Wheat. (U. S.) R. 59.

the Court just mentioned considered, that the complainants had so long slept upon their rights, that they were without remedy, whether they knew of an adverse possession, or through negligence, and a failure to look after their interests, permitted the title of another to grow into maturity.¹ In *Hill v. Crosby*, in Massachusetts,² the controversy was respecting a *right of way*, the action being for a disturbance of a way over a river, by throwing down the abutment of a bridge which the plaintiff had rebuilt. The counsel for the defendant admitted, that, in England, a grant might be presumed from an adverse enjoyment of twenty years unexplained; but they contended, that the principle was inapplicable in Massachusetts, in consequence of the statute of 1783, which requires a conveyance of any interest in land to be by deed, and to be recorded; and that the statute of 1786, which provides for laying out private ways, and making them matters of record, negatived the principle, that twenty years' enjoyment shall afford a presumption of a grant. C. J. PARSONS, after remarking, that in point of law the facts did not show a title to the way in the plaintiff, observed: "The continued use of the way and bridge by the plaintiff's father and himself, for more than twenty years, the keeping up and repairing the bridge, and the passing the river in the same place in a boat when the bridge was down, show a *continuity of possession* sufficient to warrant the presumption of a grant; and we have no doubt, a right to an easement may be so proved in this country, as well as in England."³ "It is a general and

¹ *Bowman v. Wather*, 1 How. (U. S.) R. 189.

² *Hill v. Crosby*, 1 Pick. (Mass.) R. 466.

³ The question arose in *Coolidge v. Learned*, in Massachusetts, as to

highly salutary rule of law," says Mr. C. J. SHAW, in a much later case in Massachusetts, "that a right or easement which may be acquired by grant, may be acquired by long-continued peaceable use and enjoyment, without contest or claim on the part of those who would have an interest in denying or contesting it."¹

§ 209. The enjoyment and exercise must be adverse in the exact sense that the possession of the land must

the length of time requisite to create a prescriptive right to a parcel of land for a landing place adjoining Charles River. This question was fully considered by Wilde, J., who delivered the opinion of the Court. He considered it extraordinary that the time of legal prescription should continue to be reckoned from so distant a period as the reign of Richard I., and it seemed, he said, to the Court, that, for all practical purposes, it might as well be reckoned from the creation. The limitation was founded on the equitable construction of the statute West. 13 Edw. I., c. 39, which provided, that no writ of right should be maintained except as a seisin from the time of Richard I. When the limitation of a writ of right was reduced by the statute 32 Hen. VIII., c. 2, to sixty years, a similar reduction should have been made in the limitation of the time of legal memory. This was required not only by public policy, to quiet long-continued possessions, but by a regard to consistency, as it would have been following up the principle upon which the first limitation was founded. No solid and satisfactory reason appeared, why the opinion of Rolle, (2 Abr. 269,) that an undisturbed enjoyment of an easement for a period of time sufficient to give a title to land by possession, was not adopted by the Courts. But it did appear, that the principle on which his opinion was founded was respected and carried into operation in another form; for although the Courts continued to adhere to the limitation before adopted, yet the long enjoyment of an easement was held to be a sufficient reason, not only to authorize but to require a jury to presume a grant. In the one case, the grant is presumed by the Court, or rather is presumed by the law, and in the other case, it is presumed by the jury under the direction of the Court. As Starkie remarks, "it seems to be very difficult to say, why such presumptions should not at once have been established as mere presumption of law, to be applied to the facts, without the aid of a jury." *Coolidge v. Learned*, 8 Pick. (Mass.) R. 504. The views of the Court in this case are sanctioned in the subsequent case of *Melvin v. Whiting*, 10 Ib. 297. See Ante, § 201, n. 4.

¹ *Williams v. Nelson*, 23 Pick. (Mass.) R. 141.

be so, to warrant the application of the statute of limitations, in an action of ejectment.¹ Most of the statutes of limitations in the United States, like the English statute of James I., c. 16, prescribe the period of twenty years for the right of entry upon land held adversely; but in the State of South Carolina the time is *five* years;² in Connecticut and Vermont, *fifteen* years;³ and in Pennsylvania *twenty-one* years.⁴ Yet, although the periods of limitation be different in different countries or States, as the statutes are drawn with slight variations of phrase, and all being *in pari materia*, — the object and intention being the same, — they require a uniform construction.⁵ The mere change in phraseology in an act of limitations before in force, in a revision of it, will work no alteration in the law previously declared; unless it indisputably appears that such was the intention of the legislature.⁶ It is certain, that whatever may be the period of time which the act of limitations may

¹ Colvin v. Burnet, 17 Wend. (N. Y.) R. 562; Hart v. Vose, 19 Ib. 365; Dyer v. Depui, 5 Whart. (Penn.) R. 584.

² Anderson v. Gilbert, 1 Bay, (S. C.) R. 375. But in South Carolina the law on the subject of *prescription* does not seem to take from the act of limitations of 1712, for in Sims v. Davis, 1 Cheves' Law and Eq. Rep. 2, it was assumed as settled law that *twenty* years' enjoyment of a way over another's land, was presumptive evidence of right. In Louisiana, the time of prescription varies according to the subject, from three to thirty years. (Civil Code of Louis. 3435 – 3476.) In that State the right of *drip* is acquired by prescription on an enjoyment of *ten* years without complaint. Vincent v. Michel, 7 Louis. R. 52.

³ Ingraham v. Hutchinson, 2 Conn. R. 584; Mitchell v. Walker, 2 Aik. (Vt.) R. 266; Rogers v. Paige, Brayt. (Vt.) R. 169; Norton v. Valentine, 14 Vt. R. 239; Rogers v. Bancroft, 20 Vt. R. 250.

⁴ Cooper v. Smith, 9 Serg. & Rawle, (Penn.) R. 26.

⁵ Murray v. E. India Co. 5 B. & Ald. R. 204.

⁶ Taylor v. Delancey, 2 Caines Ca. in Err. 143; Yates' Case, 4 Johns. (N. Y.) R. 359; Brown, (matter of,) 21 Wend. (N. Y.) R. 316; Theriat v. Hart, 2 Hill, (N. Y.) R. 380.

prescribe for enforcing a right of entry upon land, an adverse enjoyment of a watercourse, in any particular manner, will, in this country, be presumptive evidence of a grant. For example, the exclusive use of water flowing through an aqueduct by the owners and occupants of a house, for the term of *twenty* years, furnishes, in New Hampshire, evidence of a grant from the owner of the land through which it is brought, of a right to have it flow in the manner it has been accustomed to flow during that time;¹ and in Pennsylvania, no shorter space of time than *twenty-one* years (and that is sufficient) will create a right in one riparian proprietor to the privilege of abutting his dam upon the land of another.²

3. *Adverse Enjoyment.*

§ 210. It appears, that, in order to raise the presumption of a grant of an easement in a watercourse, the user or enjoyment must have been *adverse*. The doctrine of the Common Law, as cited by Lord Coke from Bracton, exactly agrees with the Civil Law, which expressed the essential qualities of the user by the clear and concise rule, that it should be "*nec vi, nec clam, nec precario*"³ — the possession must be peaceable, open, and as of right. When it is said, that the possession must be *long*, it is during the time required

¹ *Watkins v. Peck*, 13 N. Hamp. R. 360.

² *Beidelman v. Foulke*, 5 Watts, (Penn.) R. 308.

³ Co. Litt. 113, b; Bracton, lib. 2, f. 51; C. L. 1 ff. de serv. L. 10 ff. si serv. vind.; Gale & What. on Easem. 83. In Massachusetts, the term of twenty years is *tempus longum*. *Sargent v. Ballard*, 9 Pick. (Mass.) R. 251.

by law ; when it is said it must be *continuous*, it is meant that it must be uninterrupted by any lawful impediment.¹

§ 211. As it respects the *pacific* and *uninterrupted* character of the enjoyment or user by the Civil Law, any enjoyment or user was deemed *forcible* to which opposition was offered either by word or deed, by the owner of the servient tenement.² Any acts of interruption or opposition, from which a jury might infer that the enjoyment was not rightful, were, at Common Law, sufficient to defeat the effect of the enjoyment ; the question being, whether, under all the facts of the case, such enjoyment had been under a concession of right.³ The principle on which the statute of limitations is predicated, is, that when an action of ejectment is not brought until after the time limited has expired, it is incumbent on the lessor of the plaintiff to prove an *actual entry*, accompanied with an intention of making claim (*animo clamandi*,) within such time ; that is, there must be an entry upon the land in question ; and if by force or fraud the party is prevented from making such entry upon the land in question, his intent to do so, declared as near the land as possible, is equivalent to an actual entry. The entry must, at all events, be such as to *challenge the right* of the occupant, and such as to amount to unequivocal evidence of an intent to resume possession. The application of this general doctrine to the enjoyment of easements in watercourses, it is presumed will not be questioned ; but still, there may be occasional interruptions of such

¹ Gale & What. on Easem. 84.

² L. 1, § 5, 6, ff. quod vi aut clam.

³ See Ang. on Lim. Chap. XXX., § 10, 11.

enjoyment, which, under peculiar circumstances, will not be conclusive of a superior right to control and limit the entire use of the water, to suspend it at pleasure, or destroy it at discretion.¹ If the interruption is occasioned by the excessive dryness of seasons, or from some other cause over which the plaintiff has no control, it cannot be held that his right is by such means lost.²

§ 212. It has been held by Mr. J. STORY, that, "The nature, object, and value of the use are very material ingredients to explain and qualify the effect of such interruptions. It is not, for instance, to be presumed, that valuable mills will be erected to be fed by an artificial canal from a river, and the stream be indispensable for the support of such mills, and yet that the right to the stream is so completely lodged in another, that it may be cut off, or diminished, or suspended, at pleasure ; but, if there should not be water enough for the progressive wants of all, the riparian proprietor should reserve to himself the power of future appropriation for his own exclusive use. In such cases, reasonable presumption must be made from acts in their own nature somewhat equivocal and susceptible of different interpretations. The interruptions may arise from resistance to an attempt by the canal-owner to extend the reach of his dam further into the river for the purpose of appropriating more water, or from a desire to prevent undue waste, in dry seasons, to the injury of the riparian proprietor. But the presumption of an absolute and controlling power over the whole flow, a continuing

¹ *Tyler v. Wilkinson*, 4 Mason, (Cir. Co.) R. 397.

² *Hall v. Swift*, 6 Scott, R. 167.

power of exclusive appropriation from time to time, in the riparian proprietor, as his wants or will may influence his choice, would require the most irresistible facts to support it. Men who build mills, and invest valuable capital in them, cannot be presumed, without the most conclusive evidence, to give their deliberate assent to the acceptance of such ruinous conditions.”¹

§ 213. Where the enjoyment has been under *permission asked* from time to time, this, upon each occasion, amounts to an admission that the asker had then no right. The very mode, indeed, in which this enjoyment, under constantly renewed permission, operates in defeating the previous user, is, that it breaks the continuity of the enjoyment;² and it is expressly laid down, that the breaking the continuity is inconsistent with the enjoyment during the period of twenty years, and that, for that very reason, evidence of the breaking of such continuity is admissible on the traverse of the enjoyment.³

§ 214. In *Sargent v. Ballard*, in Massachusetts,⁴ the plaintiffs claimed a right of *dockage* upon the land of the defendant. It was claimed by what the civilians call a *prædial service*, due from the estate of the defendant to the estate of the plaintiffs, which is analogous to the right of watering cattle, conducting water, &c.⁵ It appeared that a former owner of the land had enjoyed the easement in question for less than twenty years, when the land to which it was attached was *con-*

¹ *Tyler v. Wilkinson*, 4 Mason, (Cir. Co.) R. 397.

² *Gale & What. on Easem.* 63, citing 1 Cr. M. & Ros. R. 614.

³ *Tickle v. Brown*, 4 Adol. & Ell. R. 383; *Beesly v. Clark*, 2 Bing. N. C. 705; *Sargent v. Ballard*, 9 Pick. (Mass.) R. 251.

⁴ *Ibid.*

⁵ See Ante, § 141 – 144.

fiscated by the government. The cause was tried before PARKER, C. J., who instructed the jury, that the plaintiffs, in order to establish their claim to the right they set up, as an easement, it was not requisite for them to produce a deed, or to prove that one ever existed; the rule being, that twenty years' occupation alone is sufficient ground of presumption, that the occupation began in virtue of a compact between the parties; but this rule was to be applied only in cases where all the legal qualities of such right are proved to exist. One of these legal qualities, said the learned Judge, is, "that the occupation must be *uninterrupted* by the owner of the land." Upon a motion for a new trial, one of the reasons for which was, that the instructions to the jury were erroneous, PUTNAM, C. J., who delivered the opinion of the Court, said, "The Chief Justice instructed the jury, that the plaintiffs could not join the period of the occupation of Governor Hutchinson, before the revolution, to their own subsequent occupation, because the occupation was interrupted from 1774 to 1780. The objection to this part of the charge has been involved in the consideration of the other. For if it is an essential fact, that the use should be *continued* as well as peaceable for twenty years, the time of the interruption from 1774 to 1780 could not be counted to make out the requisite time of twenty years. Such an interruption would be what the civilians call a usurpation;¹ which is a discontinuance given to prescription, in point of time and possession, 'for upon a commencement of usurpation, prescription is destroyed or annihilated, and must begin again;

¹ Ayl Civ. Law, 321, 324.

which usurpation may be by 'an extrajudicial denunciation or claim of right,' and especially 'by a contestation of suit.' But the time which an ancestor possessed may be extended and allowed to his heirs; and the same rule applies to buyers and sellers. '*Inter venditorem quoque et emptorem conjungi tempora.*'¹ All that would be required by the possessor would be, evidence that the possession had been legally continued from one owner to another.² It was therefore a correct instruction which was given by the Chief Justice, that the plaintiffs could not *lap on* Governor Hutchinson's time to Parsons's, because of the interruption from 1774 to 1780. But the plaintiffs might avail themselves of the continued possession of their ancestors, as well as of their own. And if Governor Hutchinson acquired the right before he went away, in 1774, it would have passed with the estate in virtue of the confiscation and the deed of the Commonwealth to Sargent and Parsons."

§ 215. The enjoyment must, in the second place, be *nec clam*, or open and notorious. By the Civil Law, it was sufficient to do away or vitiate the user, if, from the acts of the party claiming by virtue thereof, an intention of concealment could be inferred;³ and the user, by the Civil Law, might be secret, either from the mode in which a party enjoys it, or from the nature of the easement itself. Instances of the former kind are where the right is exercised by stealth, or in the night, *Talis usus non valebit, cum sit clandestinus et idem*

¹ Inst. Justin. lib. 2, tit. 6, § 8.

² See Rowland v. Wolfe, 1 Bailey, R. 56.

³ L. 3, § 8, ff. quod vi aut clam; Gale & What. on Easem. 85.

erit si nocturnus ;¹ and instances of the latter occur where a claim is made to an extraordinary degree of support to a house from the neighboring soil, in consequence of an excavation on the party's own land, not visible to the neighbor.² The Common Law also proceeds upon the ground that there has been an *acquiescence* on the part of the servient owner ; a ground of supposition which can never exist, if an occupation be so clandestinely taken, as not to afford notice of the same.³ The same principle will apply, as is applied to the adverse possession of land under the statute of limitations, and which has been very clearly and fully expressed by Mr. C. J. SHAW, viz., " One point seems to be well settled, which is, that very strong acts of exclusive possession, such as building, inclosing, and cultivating, and that for a long time, and *openly* and *notoriously*, are necessary, in order to constitute an actual ouster of the true owner, *who has no notice of such acts.*"⁴ In the case of uncultivated lands in new settlements, the party claiming title by possession must show an occupation of that nature and notoriety, that the owner may be presumed to know of it ; otherwise, length of time would run against a man when he had no ground to believe that his rights had been infringed.⁵ Cattle ranging at large, in North Carolina, it has been held, is not such an occupation, as will give notice to the adverse claimant ; and neither, for the

¹ Bracton, lib. 2, f. 52.

² L. 1, § 5, 6, ff. ; L. 6, ff. de adq. vel, amit. poss.

³ See Ang. on Lim. Chap. XXX. § 13, *et seq.*, and the authorities there cited in reference to the doctrine of adverse possession of land.

⁴ Blood v. Wood, 1 Met. (Mass.) R. 528.

⁵ Proprietors of Kennebec Purchase v. Skinner, 4 Mass. R. 416.

same reason, is the overflowing of land remotely situated.¹

§ 216. Thirdly, and above all, the enjoyment must be *as of right*. The fact of a peaceable and open enjoyment or user, may be said to be *per se* only an introductory fact to a link in the chain of right to an easement, and which will not simply of itself, though long continued, bar the title of him seised of the land in which the easement is claimed. The reason is, the enjoyment or user may not have been originally commenced, or subsequently continued, with an intention to claim the easement; but, on the contrary, may have been with an entire understanding between the parties, that no such claim is to be set up. The reason, in other words, is, that it may have been a *permissive* occupation, which, in the language of the Master of the Rolls, in *Cholmondeley v. Clinton*,² "However long it may in point of fact have endured, could never ripen into a title against any body; for it was not considered as the possession of the precarious occupier, but of him upon whose pleasure its continuance depended." In reference to the effect of possession in questions under the statute of limitations, (and we have seen that the claim of title to an easement by virtue of twenty years' enjoyment, is analogous to a claim of title to the land itself by virtue of possession for the time prescribed by that statute,) Marshall, C. J., says that it has not only been recognized in the Courts of England, but in all other countries, where the rules in those Courts have been adopted, that a possession which was

¹ *Andrews v. Mulford*, Hayw. (N. C.) R. 311.

² *Cholmondeley v. Clinton*, 2 Jac. & Walk. R. 1.

permissive and entirely consistent with the title of another, should not bar that title; and that it would shock the sense of right, which must be felt by all legislators and all judges, were it otherwise.¹ The enjoyment of an easement had under the license or permission from the owner of the servient tenement, is consistent with the right of the owner of the servient tenement, and consequently confers no right to the easement. Each renewal of the license rebuts the presumption which would otherwise arise, that such enjoyment was had under a claim of right to the easement.² The "precarious enjoyment" of the Civil Law, by which, as has been already seen, no prescriptive right could be acquired, is identical with the permissive enjoyment of the Common Law.³ If, therefore, the enjoyment is shown to have originated in mistake, license, or favor; or if it was commenced and continued in a manner which has not indicated a *claim of right*, the enjoyment is not adverse.⁴ So if within twenty years from the time an adverse user first commenced, the person using it adversely has applied to the owner of the land to purchase the privilege or easement; this, if explained, raises no presumption of a grant.⁵ But if such easement has been possessed and used for the term of twenty years, in a manner to furnish evidence of an adverse enjoyment, and raise the presumption of a grant; and the owner, after the expiration of that term of time, denies the right, and there is there-

¹ United States v. Arredondo, 6 Peters, (U. S.) R. 743.

² Monmouth Canal Co. v. Harford, 1 Cr. M. & Ros. R. 614.

³ Gale & What. on Easem. 85.

⁴ Campbell v. Wilson, 3 East, R. 294.

⁵ Watkins v. Peck, 13 N. Hamp. R. 360.

upon a negotiation for a purchase, and an agreement which is not perfected ; such attempt to purchase will not preclude the party from relying upon the presumption of grant by reason of the previous adverse possession.¹ The enjoyment without interruption for the length of time for the right of entry upon land, is so strong evidence of a right, that the jury should not be directed to consider small circumstances as founding a presumption, that it arose otherwise than by grant.²

§ 217. Lord Ellenborough, in *Bealy v. Shaw*,³ speaks of twenty years' enjoyment of water, in any particular manner, as affording a "conclusive" presumption of a grant. It has been thought that the word "conclusive" is rather oddly joined to the word presumption, it being of the very essence of presumptive evidence, that it must yield to stronger proof. Lord Ellenborough must undoubtedly be understood as meaning, by a "conclusive" presumption, one, which unexplained or uncontradicted, will conclusively authorize a jury to find the fact. This construction is necessary to reconcile that learned Judge to his own course of decision ; for, in *Campbell v. Wilson*,⁴ determined only two years before this, he and the whole Court held, that twenty years' enjoyment was merely presumptive evidence to be explained or rebutted like any other presumption.⁵ In *Livett v. Wilson*,⁶ upon a question of twenty years'

¹ *Watkins v. Peck*, 13 N. Hamp. R. 360.

² *Campbell v. Wilson*, *ub. sup.*

³ *Bealy v. Shaw*, 6 East, R. 215, and Ante, § 205.

⁴ *Campbell v. Wilson*, *ub. sup.*

⁵ Such was the view taken by the Court of Appeals of Virginia, in *Nichols v. Ayler*, 7 Leigh, (Va.) R. 546, and another case in Virginia, therein cited ; and by the Supreme Court of Connecticut, in *Branch v. Doane*, 18 Conn. R. 233.

⁶ *Livett v. Wilson*, 3 Bing. R. 115.

possession, Best, C. J., says, — “I do not dispute, that if there had been uninterrupted usage for twenty years, the jury might be authorized to presume it originated in a deed; but even in such a case, a Judge would not be justified in telling a jury that they *must* presume a deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them, and decide accordingly;” and the rest of the Court were of the like opinion.

§ 218. The words used by Mr. Justice STORY, in *Tyler v. Wilkinson*,¹ are, — “By our laws, upon principles of public convenience, the term of twenty years’ exclusive, uninterrupted enjoyment, has been held a conclusive presumption of a grant or right.” But by this language, he is not understood to have intended an enjoyment, which had been by the *favor and at the will* of the owner for twenty years.² In two instances, in which the subject of the conclusiveness of the presumption was fully considered by the Court of Appeals of Virginia,³ it was held, that the presumption of a right or of a grant arises from the long *acquiescence* of the party, and does not arise where the enjoyment is contested; and the Court rely on the authority of *Campbell v. Wilson*.⁴

§ 219. The Supreme Court of Massachusetts hold,

¹ *Tyler v. Wilkinson*, 4 Mason, (Cir. Co.) R. 402.

² *Sargent v. Ballard*, 9 Pick. (Mass.) R. 251.

³ See preceding page, note 2.

⁴ On a stream of water, issuing from a large natural pond, were mills owned respectively by A and B; the mill nearest the outlet of the pond being owned by B, and that below by A. Both claimed under C, who, in 1800, owned the land at the outlet of the pond and below, and erected mills on the site of A’s mill. About the same time, C, in conjunction with other mill owners below, erected a dam, flume, and gate, at the outlet

that, in order to raise the presumption of a grant, the enjoyment "must be under a claim of right, and contrary to the interests of the owner. An enjoyment with the consent of the owner, or consistently with the rights of the true owner, has no tendency to prove a conveyance from him; for the very ground of the presumption is the difficulty or impossibility of accounting for the grant, or some other lawful conveyance. But, if the possession can be accounted for consistently with the title, no presumption arises."¹ A learned Judge of the Supreme Court of the United States, has expressed a like opinion, in which he says, that presumptions (of the nature we are considering) can never arise where all the circumstances are perfectly consistent with the non-existence of a grant.²

§ 220. In delivering the judgment of the Court of Exchequer, in a case in which the qualities of an enjoyment necessary to invest it with right by lapse of time were considered,³ Mr. Baron Parke said,—"In order to establish a right of way, and to bring the case within this section,⁴ it must be proved that the claimant

of the pond, deepening and widening the channel, for the purpose of controlling the water there, for the more advantageous use of it for their mills. B's mill was erected in 1834, before which C and the other mill owners had claimed and exercised the exclusive right to dam up and control the water at the outlet of the pond, without obstruction. In an action brought by A against B for obstructing the water at B's mill, it was held, that the acts of C, for such a period, unexplained by any circumstances which deprived them of an adverse possession, constituted a conclusive presumption of a grant. *Hickox v. Parmelee*, 21 Conn. R. 86.

¹ *Arnold v. Stevens*, 24 Pick. (Mass.) R. 106.

² *Ricard v. Williams*, 7 Wheat. (U. S.) R. 109. The same doctrine is maintained expressly in *Brandt v. Ogden*, by Mr. J. Spencer, 1 Johns. (N. Y.) R. 156.

³ *Bright v. Walker*, 1 Cr. M. & Ros. R. 219.

⁴ Of the Act commonly called the "Prescription" Act of 2 and 3 Will.

has enjoyed it for the full period of twenty years, and that he has done so *as of right* ; for that is the form in which, by section 5,¹ such claim must be pleaded ; and

IV. c. 71, which is as follows : “ Sect. 2. And be it further enacted, that no claim which may be lawfully made at the Common Law, by custom, prescription, or grant, to any way or other easement, or to any water-course, or the use of any water to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto, without interruption, for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years ; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated ; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.”

¹ Of the above act, which is as follows :— “ And be it further enacted, that in all actions upon the case and other pleadings wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation ; and that in all pleadings, to actions of trespass, and in all other pleadings, wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done ; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.”

the like evidence would have been required before the statute, to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done — if he shall have occasionally asked permission of the occupier of the land — no title would be acquired, *because it was not 'enjoyed as of right.'*" The authority of this case and the doctrines laid down by the Court were fully recognized in the cases of the Monmouthshire Canal Co. *v.* Harford,¹ and Tickle *v.* Brown.²

§ 221. It is clearly, therefore, an enjoyment, *with an intent to claim* against the true owner which renders it adverse to his rights, and upon this the decision in every case is made to depend. The question of adverse enjoyment or not is a question on which the Court may instruct the jury; but the jury must be left to their own view of the effect of the evidence of the intent (*quo animo*) which has attended the enjoyment. That, as Lord Mansfield said of disseisin, "is a fact to be found by a jury."³ The *burden of proving* the ad-

¹ Monmouthshire Canal Co. *v.* Harford, 1 Cr. M. & Welsh. R. 614.

² Tickle *v.* Brown, 4 Adol. & Ell. R. 369.

³ Taylor *v.* Horde, 1 Burr. R. 60. That the question of adverse enjoyment should be left to the jury as one of intention, see the following cases: Tyler *v.* Wilkinson, 4 Mason, (Cir. Co.) R. 397; Haight *v.* Morris Aqueduct, 4 Wash. (Cir. Co.) R. 601; Cooper *v.* Smith, 9 S. & Rawle, (Penn.) R. 26; Strickland *v.* Todd, 10 Ib. 63; Butz *v.* Ihrie, 1 Ib. 218; Hepburn *v.* M'Dowell, 17 Ib. 383; Smith *v.* Smith, 3 Halsted, (N. J.) R. 140; Ingraham *v.* Hutchinson, 2 Conn. R. 584; Gleason *v.* Gray, 4 Ib. R. 418; Manning *v.* Smith, 6 Ib. 289; Sherwood *v.* Day, 4 Day, (Conn.) R. 244; Curtis *v.* Jackson, 13 Mass. R. 514; Cook *v.* Hull, 3 Pick. (Mass.) R. 269; Reid *v.* Gifford, 1 Hopk. (N. Y.) Ch. R. 416; Stiles *v.* Hooker, 7 Cow. (N. Y.) R. 266; Coalter *v.* Hunter, 4 Rand, (Va.) R. 58; Bullen *v.*

verse possession is on the party claiming the easement; and if he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor.¹ But if he shows a well known, an open, and uninterrupted enjoyment, proof must come from the other side to show, that it was by license or permission, or that it was to be restrained or limited in point of time.² The claim of an easement is in derogation of the ordinary rights of property, and looking at the subject in this view, it appears clearly, that it lies upon the party asserting such claim in opposition to common right, to support his case by evidence. In *Cross v. Lewis*,³ the absence of any evidence as to the earlier state of the windows was indeed held to operate in favor of the plaintiff, —

Runnels, 2 N. Hamp. R. 255; *Mitchell v. Walker*, 2 Aik. (Vt.) R. 266; *Blanchard v. Baker*, 6 Greenl. (Me.) R. 263; *Corning v. Gould*, 16 Wend. (N. Y.) R. 531; *Baldwin v. Calkins*, 10 Wend. (N. Y.) R. 167; *Rogers v. Mabe*, 4 Dev. (N. C.) R. 180; *Buddington v. Bradley*, 10 Conn. R. 213; *Tucker v. Jewett*, 11 Ib. 311; *Kennedy v. Scovil*, 12 Ib. 317; *Rogers v. Paige*, Brayt. (Vt.) R. 169; *Norton v. Valentine*, 14 Vt. R. 239; *Davis v. Fuller*, 12 Ib. 178; *Wilson v. Wilson*, 4 Dev. (N. C.) R. 154; *Sargent v. Gutterson*, 13 N. Hamp. R. 467; *Whittier v. Cocheco Manuf. Co.* 9 Ib. 456; *Dyer v. Depui*, 5 Whart. (Penn.) R. 584; *Branch v. Doane*, 18 Conn. R. 233; *Darlington v. Painter*, 7 Barr, (Penn.) R. 473; *Shreve v. Voorhees*, 2 Green, (N. J.) R. 25; *Chapman v. Thames Manuf. Co.* 13 Conn. R. 269; *Middleton v. Gregorie*, 2 Rich. (S. C.) R. 631; *Odiorne v. Lyford*, 9 N. Hamp. R. 502; *Beidelman v. Foulke*, 5 Watts, (Penn.) R. 308; *Corning v. Gould*, 16 Wend. (N. Y.) R. 531; *Cary v. Daniels*, 8 Met. (Mass.) R. 466; *McDougal v. Clark*, 7 B. Mon. (Ken.) R. 448.

¹ 2 Greenl. Ev. § 539; *Sargent v. Ballard*, 9 Pick. (Mass.) R. 251; *Davies v. Stephens*, 7 C. & Payne, R. 570; *Jarvis v. Dean*, 3 Bing. R. 447.

² Per Lord Keeper Wright, *Finch v. Resbridger*, 2 Verm. R. 391.

³ *Cross v. Lewis*, 2 B. & Cress. R. 686, and *Gale & What. on Easem.* 79, and 1 *Crabb on Real Property*, § 450.

the party claiming the easement;—but the substantial proof (that is, proof of a user for twenty years) had already been given by the claimant; and this, unrebutted by any evidence to take the case out of the ordinary rule, was of course sufficient to establish the easement.

§ 222. A grant *upon condition* may be presumed from the use and enjoyment for twenty years adversely, and also the performance of the duty connected with the easement.¹ Repairs made upon an aqueduct, which is laid through the land of another, cannot be regarded as in the nature of rent, or as an acknowledgment that the easement is held at the pleasure of the owner of the land, without some other evidence tending to show an agreement to that effect. Nor will the fact, that the owner of the water takes¹ part of the water from the aqueduct, show, that the use by the party who takes the rest, and repairs, is merely permissive; though it may be evidence that the party repairing takes the water, and the privilege of entering and repairing, on the *condition* of furnishing the owner of the land with a portion of the water; and the *performance* of the condition may be essential to the continuance of the right.²

§ 223. It has not unfrequently happened in England, that the same presumption has been spoken of

¹ Prescriptions may be upon condition. Gray's Case, 5 Co. R. 79; Cro. Eliz. 546; 2 H. Bl. R. 224. A grant, upon condition that the grantee shall perform certain acts, may be presumed from a usage of more than twenty years to exercise the right adversely, and perform the duty connected with it, as well as an absolute grant may be presumed. Mitchell v. Walker, 2 Aik. (Vt.) R. 270.

² Watkins v. Peck, 13 N. Hamp. R. 360.

by some learned Judges as a rule of law, whilst by others it has been treated as above mentioned, that is, merely as proper to be recommended to a jury, or as one which a jury might properly make.¹ The mode of carrying out the policy of the law by the intervention of a jury, has been strongly objected to. A very distinguished writer has objected to it.²

¹ Phillips & Amos on 'Evidence, 460, (8th edit.); Gale & What. on Easem. 67.

² Mr. Starkie says: "The practice of requiring juries in any case to be mere passive instruments in finding facts upon their oaths, in the existence of which the Court itself did not believe, although now established, is of singular origin. The effect is indirectly to establish an artificial presumption, which, for want either of inclination or authority, could not be established and applied directly. It seems very difficult to say, why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the Courts, without the aid of a jury. That course would certainly have been more simple; and any objection as to the want of authority would apply with equal, if not superior, force to the establishing such presumptions indirectly through the medium of a jury." 2 Stark. on Ev. 675. Again; "Notwithstanding the admission of the presumptions," says the same learned author, "which appear now to be established, and necessary rules of law, this branch of jurisprudence cannot but be considered as imperfect and inartificial, more especially if it be contrasted with the labored distinctions of the Roman Law upon the same subject. The presumption being one of law, arising out of the fact of continued and adverse possession unrebutted, ought, as a rule of law, to be applied whenever the facts to which it is applicable arise; and yet, unless the jury strain their consciences so far as to find a grant, in the actual existence of which the Court itself may not believe, the rule of law is inapplicable; in other words, the rule is useless, unless the jury, upon the recommendation of the Court, find a fact, which, in all human possibility, never existed, and which is perfectly unconnected with the real merits of the case; surely, so heavy a tax upon the consciences and good sense of juries, which they are called on to incur for the sake of administering substantial justice, ought to be removed by the assistance of the legislature." Ibid. 669. The stat. 2 and 3 Will. 4, c. 71, (commonly called the Prescription Act,) "was intended," said Mr. Baron Parke, "to accomplish this object, by shortening in effect the period of prescription, and making that possession a bar or title of itself, which was so before only by the intervention of a jury." *Bright v. Walter*, 1 Cr. M. & Ros. R. 217.

4. Right acquired commensurate with the Extent of the Enjoyment.

§ 224. The extent of the presumed right is determined by the user on which is founded the presumed grant, the right granted being commensurate with the right enjoyed.¹ If one has ancient pits, which are replenished by another, the pits cannot be lawfully enlarged;² and if the enjoyment of the water has been limited to certain days in the week, it cannot lawfully be used on any other day.³ So, a right to a sufficiency of water power to carry a certain number of spindles, cannot be extended to water power sufficient to carry a larger number.⁴ In *Darlington v. Painter*, in Pennsylvania,⁵ in which it appeared, that the defendant, for more than twenty years, had been in the habit of using a certain ditch to pass off waters running over, or accumulating upon his lands, and that in 1844 he built a mill, and at the same time, entered upon the plaintiff's land and cleansed the ditch, saying he intended to use it for a tail-race; but at the time of the action brought, the mill had not commenced working; it was held, that

¹ *Bealy v. Shaw*, 6 East, R. 208; *Alder v. Savill*, 5 Taunt. R. 424; *Russell v. Scott*, 9 Cow. (N. Y.) R. 279; *Dyer v. Depui*, 5 Whart. (Penn.) R. 584; *Watkins v. Peck*, 13 N. Hamp. R. 360; *Cowell v. Thayer*, 5 Met. (Mass.) R. 253; *Chapman v. Thames Manuf. Co.* 13 Conn. R. 269; *Manier v. Myers*, 6 B. Mon. (Ken.) R. 132; *Bigelow v. Battel*, 15 Mass. R. 313; *Strong v. Benedict*, 5 Conn. R. 210; *Baldwin v. Calkins*, 10 Wend. (N. Y.) R. 167; *Simpson v. Seavey*, 8 Greenl. (Me.) R. 138; *Rogers v. Bruce*, 17 Pick. (Mass.) R. 184.

² *Brown v. Best*, 1 Wils. R. 174.

³ *Strutt v. Bovingdon*, 5 Esp. R. 56.

⁴ *Bigelow v. Battel*, 15 Mass. R. 313.

⁵ *Darlington v. Painter*, 7 Barr, (Penn.) R. 473.

the defendant could not use it for any purpose, that would increase the flow, enlarge the ditch, or affect the water in any way different from that use for which the watercourse was granted.

§ 225. The rule that the mode or manner of using the water shall not be materially varied to the prejudice of others, was applied in an important case in the State of New York, (an appeal in equity, confirming the decision of the Court below,) in which it was held, that if the proprietor of land, at the head of a stream, changes the natural flow of the water, and continues such change for twenty years, he cannot afterwards restore the flow of the water to its natural state, when it will have the effect to destroy the mills of other proprietors below, which have been erected in reference to such change in the natural flow of the stream. It appeared, that the complainants were the several owners of different mills situated upon the same stream, which mills depended upon the particular use of the waters of a pond at the head of the stream for the running thereof; and, as such mill-owners, had been in the uninterrupted enjoyment of the water in a particular manner for more than twenty years, it was held, that a Court of Equity had jurisdiction to establish the right of the lower proprietors to the use they had made of the waters of the pond, and to restrain the defendant from disturbing them in the enjoyment thereof, by an alteration made at the outlet of the pond.¹

¹ *Belknap v. Trimble*, 3 Paige, (N. Y.) Ch. R. 577. This case may require a little more explanation. The plaintiffs made out that they were the owners and occupiers of ancient mills on the stream issuing from the pond, and the question was, whether the defendant, by assuming the control of the waters at the pond, to the great and acknowledged damage of

§ 226. But although the extent of the right is to be measured and regulated by the enjoyment upon which the right is founded, the party is yet allowed freedom in the manner of exercising it. It was con-

the plaintiffs, had not acted in violation of their rights. For more than forty years the plaintiffs and their predecessors were in the habit of constantly resorting to the pond for water when they needed it, and of scouring, altering, and improving the outlet, without the permission of any one, or without the denial of right by any one. The defendant admitted, that at the time, he had no waterworks at the outlet, or on the stream; did not pretend that the pond was of any value to his farm; and it was considered by the Court evident, that in purchasing it, he did it with the view of rendering the property of the plaintiffs useless, until they bought him out, or made terms with him. In a case in the English Court of Exchequer, in 1846, the substance of the declaration was, that before and at the time of committing the grievances, the plaintiff was, and from hence hitherto had been, possessed of a rolling-mill, with the appurtenances, and by reason thereof, ought to have had and enjoyed the benefit of the water of a certain watercourse, which until the diversion of the water, had run and flowed by means of a certain weir, therein erected, a little above the said mill, being kept at a certain height, for supplying the same with water. The breach, in substance, was, that the defendant pulled down the said weir, and placed and fixed the same at a much lower height than it ought to have been, and so continued the same. It was pleaded, that the defendant was the occupier of a certain close, next adjoining to the watercourse, and that he and all other occupiers of the same, for the period of twenty years, "*next before the commencement of this suit,*" enjoyed, as of right, and without interruption, the right as occasion required, of removing a part of the said weir, and fixing the same at a lower height, and of keeping at such lower height, for the purpose of diverting the water for irrigation, at the times when irrigation was necessary for the close; wherefore, the defendant removed the said part of the weir, and placed and kept it at such lower height, to such an extent, and for such time, and no more or longer than was necessary for diverting the water for the irrigation of the close. It was held, that this plea was good; and that it was not an argumentative traverse of the right alleged in the declaration, inasmuch, as it set up a right, which, under the stat. 2 and 3 Will. 4, ch. 71, was not complete, until the commencement of the suit; and, therefore, was not inconsistent with the plaintiff's right to have the weir at a greater height, at the time of the act complained of. *Ward v. Robins*, 15 M. & Welsb. R. 237.

tended in Luttrel's case,¹ that the plaintiff by taking down old fulling-mills, and by erecting new mills of another nature and for another object, had destroyed his prescription, and could not prescribe to have any water to the new mills; and it was said, "if a man grants me a watercourse to my fulling-mills, I cannot convert them to corn-mills, *nec e contra*." Yet, "forasmuch as in general the mill was the substance, and the addition demonstrates only the quality, and the alteration was not of the substance, but only the quality or name of the mill, and that without any prejudice in the watercourse to the owner thereof; for these reasons it was resolved, that the prescription remained." So, in *Saunders v. Newman*,² where the claim in the declaration was for a mill generally, it was held, that the right to the discharge of the water was not lost by an alteration in the dimensions of the mill-wheel. "The owner," said Mr. Justice ABBOTT, in that case, "is not bound to use the water in the same precise manner, or apply it to the same mill; if he were, that would stop all improvements in machinery." In *Hall v. Swift*,³ where the plaintiff had a right to water, flowing from the defendant's land across a lane, to his own land, and it appeared that, "formerly the stream meandered a little down the lane before it flowed into the plaintiff's land; and that, in the year 1835, the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course, by making a straight cut direct from the opening or spout under the defendant's hedge,

¹ *Cottel v. Luttrel*, 4 Co. R. 87 a; and see *ante*, 149 a, *et seq.*

² *Saunders v. Newman*, 1 B. & Ald. R. 258.

³ *Hall v. Swift*, 6 Scott, R. 167.

across the lane, to his own premises ;” and this, it was contended, negatived the right claimed in the declaration ; TINDAL, C. J., in delivering his opinion, said : “ If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment, — the making straight a crooked line or footpath would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument could base itself.” ¹

§ 227. In this country the doctrine is as well settled, that where a right has been acquired by virtue of twenty years’ enjoyment, to use a certain quantity of water, a change in the mode and objects of use is justifiable ; and here, as in England, the only restriction is, that the alterations made from time to time shall not be injurious to those whose interests are involved.² It cannot be doubted, says GIBSON, C. J., that the nature of the user cannot be changed in any case, unless the flow remain the same as to quantity and rapidity.³ Where the plaintiff erected a dam across the outlet of

¹ See also *Thomas v. Thomas*, 2 Cr. M. & Ros. R. 34.

² *Strickler v. Todd*, 10 S. & Rawle, (Penn.) R. 63 ; *Blanchard v. Baker*, 8 Greenl. (Me.) R. 253. In *Holmes v. Shreve*, in New Jersey, it was held, that if waste-gates be constructed by the defendants, and used by them for a course of years, with the complainants’ assent, the complainants cannot have relief by injunction, so long as the use of the gates is confined to their original purpose ; but if an attempt is made to apply them to a different purpose, injurious to the complainants, the Court will, by injunction, prohibit the use of the gates. 3 Green, (N. J.) Ch. R. 116. All that the law requires, is, that the mode or manner of using the water should not have been materially varied to the prejudice of others. Per Chancellor Walworth, in *Belknap v. Trimble*, 3 Page, (N. Y.) Ch. R. 605 ; *Johnson v. Rand*, 6 N. Hamp. R. 22.

³ *Darlington v. Painter*, 7 Barr, (Penn.) R. 473.

a pond, and acquired a right by prescription to use the water, it was held, that the erection of a new dam by the defendants higher than the old one, was not, in itself, an infringement of the plaintiff's rights; for the plaintiff had a right to adopt and use the new dam to the height of the old one; but that the defendants were entitled, as against the plaintiff, to use the water when raised by means of the new dam above the top of the old dam, provided they did not thereby prejudice in any manner the rights of the plaintiff.¹

§ 228. Where a right exists to use a certain quantity of water for propelling machinery, a change may be made not only in the mode and objects of the use, but in the *place* of using it, if the quantity of water used is not increased, and the change is not to the prejudice of others. Thus, a party had for more than twenty years used a certain quantity of water at a particular dam, it was held he might open his gates and draw that quantity, without using it there, in order to use it at other works below on the same stream. And the owner of a mill may even draw a larger quantity of water through his gates than he has been accustomed to use, if he has lawfully provided the surplus, for his own use, by means of a *reservoir* above, and causes no injury thereby to the owner of another mill situated upon the same dam, or to other persons having rights in the stream.²

§ 229. In a case in the English Court of Exchequer, in 1845,³ in which the action was for the diversion of

¹ Rogers v. Bruce, 17 Pick. (Mass.) R. 184.

² Whittier v. Cocheco Manuf. Co. 9 N. Hamp. R. 454. And see Bracegirdle v. Peacock, 10 Jur. 9.

³ Hale v. Oldroyd, 14 M. & Welsb. R. 789.

water, the plaintiff alleged in his declaration, a reversionary interest in three closes of land, to wit., *three ponds* filled with water, one pond being on each of the said closes and a right to the flow of the water into the said closes, for supplying the said ponds in the said closes with water for the watering of cattle ; and the defendant traversed the right to the flow of the water, as alleged. It appeared in evidence, that the plaintiff had enjoyed an immemorial right to the flow of this water into an *ancient* pond, in one of his closes ; but that above thirty years ago, he made a *new* pond in each of the three closes, and turned the water so as to supply them, and thenceforth disused the old pond, which became gradually filled up and overgrown with grass. It was held, that the plaintiff, under his declaration, was entitled to recover, in respect to his right to the flow of water to the *old* pond, though it was contended by the defendant's counsel, that the three *new* ponds were alone claimed in the declaration. By POLLOCK, C. B. : " The plaintiff, in bringing his action, and declaring for an infringement of his right to a flow of water to the three ponds, meant, no doubt, to recover, in respect of the three *new* ponds." By PARK, B. : " The use of the old pond was discontinued, only because the plaintiff obtained the same or a greater advantage, from the use of the three new ones. *He did not thereby abandon his right, he only exercised it in a different spot ;* and a substitution of that nature, is not an abandonment. He has a right, therefore, under this declaration, to recover in respect of the old pond. The right alleged, is a right to have the uninterrupted flow of certain surplus water, into a pond ; and that right is equally proved, whether it be by prescription or lost grant, or under Lord Tenterden's Act. The declara-

tion means no more than this, that the plaintiff has a right to the overflow of water, either in one pond or in three ponds."

§ 230. It should, however, be observed, that the fact of how much water has been *actually used*, is not always decisive of the nature and extent of the right; that is, if for the space of twenty years, a certain quantity of water has run uninterruptedly, and as of right to a certain mill, the right to have that quantity run, becomes an appurtenance to the mill, though the whole of it may not have been necessary for the purposes for which the mill has been employed. In *Tyler v. Wilkinson*,¹ it appeared that a certain quantity of water had been accustomed to run in an artificial canal, called "Sergeant's trench," leading from the main stream; and Mr. J. STORY, in giving judgment, said,—"The proprietors of Sergeant's trench, are entitled to the use of so much of the water of the river, as has been accustomed to flow through that trench, to and from their mills, (whether actually used, or necessary for the same mills, or not,) during the twenty years last, before the institution of this suit, subject only to such qualifications and limitations, as have been acknowledged, or rightfully exercised by the plaintiffs, as riparian proprietors, or as the owners of the lower mill-dam, during that period. But here their right stops; they have no right farther to appropriate any surplus water, not already used by the riparian proprietors, upon the notion that such water is open to the first occupiers. That surplus is the inheritance of the riparian proprietors, and not open to occupancy."²

¹ *Tyler v. Wilkinson*, 4 Mason, (Cir. Co.) R. 397.

² See *Ante*, § 130-136. A plea of prescription is supported, if the

5. *The Presumption as it relates to Parties not in Possession.*

§ 231. In an action for the disturbance of a water privilege, and indeed of any easement, the enjoyment of it may be shown not to have been adverse, by evidence that the plaintiff has not been in possession of the premises, to which the privilege or easement claimed, is attached. Thus, if a tenant for a term of years, permits another to enjoy an easement in his estate for twenty years, and then the particular estate determines, such enjoyment will not, as a general rule, affect the interests of him who has the inheritance in *remainder* or *reversion*. And when the remaining or reversionary interest commences, the party entitled may dispute the right to the easement, and the length of enjoyment will be no bar to his claim; for as the tenant cannot bind the landlord, by his own positive act, so he cannot by his *laches*, or inaction and forbearance.¹

§ 232. The case of *Bradbury v. Grinsell*, in the King's Bench,² was determined according to the rule just mentioned. A, who was a tenant for life, with a power to make a jointure, which he afterwards executed, gave license to B, in 1747, to erect a wier on the river T., in A's soil, for the purpose of watering B's meadows; and then A died, and the jointress

party prove a right more extensive than that pleaded; but the right must be of such a nature that it may comprehend the right pleaded. Per Coleridge, J., in *Bailey v. Appleyard*, 8 Adol. & Ell. R. 167.

¹ Gale & What. on Easem. 75; and see *Hale v. Oldroyd*, 14 M. & Welsb. R. 789.

² Cited in *Wms. Saund.* 175, n. (d).

entered and continued seised, down to 1799, when the tenant of A's farm diverted the water of the river from the wier. Upon which, the tenant of B's farm brought an action on the case of diverting the water. It was held, that the uninterrupted possession of the water for so many years, with the acquiescence of the particular tenants for life, did not affect him who had the inheritance in reversion, and the Court were clear upon the point of law as above stated. So in *Barker v. Richardson*,¹ where the plaintiff's windows had existed for more than twenty years. The defendants had erected a building, which occasioned the darkening of the plaintiff's windows, upon their adjoining land, which had been glebe land, belonging to the rectory; but within the last six years, had been conveyed in exchange, by the then rector, with the consent of the bishop and patron, under the authority of 55 Geo. III. and by the grantee conveyed to the defendants. It was objected on the part of the defendants, that although, after uninterrupted possession of an easement for twenty years, the law will, in ordinary cases, presume a grant, yet that rule extended only to those cases where the presumed grantor was capable of making the grant. And that, in this case, the rector, who was a mere tenant for life, had no power to make such a grant, and therefore length of time could not operate against him, who was not seised of any estate of inheritance. Mr. C. J. ABBOTT admitted, that twenty years' uninterrupted possession of any easement, is generally sufficient to raise the presumption of a grant; but in this case, he thought the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor;

¹ *Barker v. Richardson*, 4 B. & Ald. R. 578.

and that the grant, therefore, would be invalid, and consequently the present plaintiff could derive no benefit from it, against those to whom the glebe had been sold; and his opinion was, that the evidence in the case was insufficient to entitle the plaintiff to maintain the action. Lord ELLENBOROUGH, on the argument for a new trial, in *Daniel v. North*,¹ observed, — “How can such a presumption be raised against the landlord, without showing that he knew of the fact, when he was not in possession, and received no immediate injury from it at the time.” In delivering his opinion, the learned judge said further, — “The foundation of presuming a grant against any party, is, that the exercise of the adverse right on which such presumption is founded, was against a party capable of making the grant; and that cannot be presumed against him, unless there were some probable means of his knowing what was done against him; for it cannot be laid down as a rule of law, that the enjoyment of the plaintiff’s windows during the occupation of the opposite premises by a tenant, though for twenty years, without the knowledge of the landlord, will bind the latter, and there is no evidence stated in the report, from which his knowledge should be presumed.”

§ 233. It is clearly not incompatible with the above doctrine, and indeed it has so been positively decided, that presumptions may in certain cases be made against the dominant land-owner, during the possession and acquiescence of his tenant. The tenant may suffer a

¹ *Daniel v. North*, 4 B. & Ald. 579. The action was for obstructing ancient lights, and it appeared that the premises, on which the obstruction was erected, had been occupied, during twenty years, by a tenant at will, and there was no evidence that the owner of those premises was aware of such enjoyment.

direct and palpable injury to his own enjoyment, and thus fairly be presumed to be on the alert in guarding the rights of his landlord, while guarding his own enjoyment, as in the case, for instance, of the destruction of a way.¹ It is a well-established rule in the construction of the statute of limitations, that the rights of persons in remainder and reversion, are not affected by neglect in the tenant for life or for years, during the continuance of the particular estate, in resisting the acts of wrongdoers; and yet there may be particular cases in which presumptions may exist to the contrary. If a *boundary line* is disputed, and the dispute is adjusted by the agreement of the tenant for life, such agreement is presumptive evidence to bind the remainder-man; for although the remainder-man may assert that his right has been invaded, yet the submission of the tenant for life, (if without fraud,) will raise a strong presumption against those who succeed him.²

§ 234. There is, says Lord REDESDALE,³ a vast number of cases, in which the act of tenant for life binds the remainder-man as evidence; and he then refers to the enjoyment of easements, in which case, if it can be proved, that the landlord has actual knowledge of a disturbance of the easement, while in the occupation of the tenant, he will be bound. Questions of this sort are undoubtedly proper for the determination of the jury, as depending upon the circumstances proved.⁴

¹ Daniel v. North, *ubi sup.*

² Saunders v. Annesley, 2 Sch. & Lef. R. 101, and cited in Ang. on Lim. p. 450.

³ Ibid.

⁴ Daniel v. North, *ubi sup.*; Wakeman v. West, 8 C. & Payne, R. 105.

In *Dawson v. The Duke of Norfolk*,¹ Mr. J. BAYLEY, at nisi prius, did not advise the jury to presume a grant, because it did not appear that the turning of the plaintiff's cattle on the common, was generally known to those who had been trespassed upon; and on that ground he left it to the jury, whether it was not an encroachment, negating the right; and this direction was, by the Court of Exchequer, held proper. In *Wood v. Veal*,² it appeared, on the part of the plaintiff, that, in the year 1719, a lease for *ninety-nine* years was given of the plaintiff's premises; and it was held by the Court of King's Bench, that, under these circumstances, the jury were well justified in finding that there was no public right of way; inasmuch as there could be no dedication by the tenant, for that term of years, nor by any one except the owner in fee. Therefore, to use the language of Mr. C. J. DALLAS, — "When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts; and here, where there is no direct evidence, whether or not the owner of the land had any knowledge of what passed, the inference to be drawn, must, in a peculiar degree, depend on the nature of the accompanying facts; and the presumption in favor of a grant will be more or less probable, as it may be more or less probable that those facts could not have existed, without the consent of the owner of the land. The circumstances proved in the present case, were sufficient to leave to a jury, as circumstances from which the knowledge of the owner, and his acquiescence, on the

¹ *Dawson v. The Duke of Norfolk*, 1 Price, R. 246.

² *Wood v. Veal*, 5 B. & Ald. R. 454.

supposition of a preceding grant, might fairly be presumed.”¹

§ 235. If the time has once began to run against the dominant land-owner, in consequence of his knowledge of, and acquiescence in, the enjoyment of the easement, the intervention of a particular estate, will not then stop it.² From the observations of BAYLEY, J., in *Cross v. Lewis*,³ it would appear, that provided the existence of the easement prior to the commencement of the tenancy, was shown, and a sufficient length of enjoyment had taken place, to afford evidence of a grant, the burden of proof would be thrown upon the owner of the land sought to be made liable to the easement; and unless he could show such previous user to have taken place, without his knowledge, the right to the easement would be established.⁴

§ 236. The foregoing doctrine, in relation to the enjoyment of easements in estates, during the possession thereof, by tenants for life, or years, will apply to every *temporary interest* in the land;⁵ so that time does not begin to run against a privilege reserved in a deed, if by the deed it clearly appears that an immediate occupation and exercise of the privilege was not at the time contemplated by the parties; as where

¹ *Gray v. Bond*, 2 Bro. & Bing. R. 667. An adverse possession of twenty years, is, in England, not a bar to a rector or vicar, except as against the present incumbent, who submitted to such possession. *Runcorn v. Doe*, 5 B. & Cress. R. 696.

² 2 Greenl. Ev. § 545; Best on Presumpt. 89.

³ *Cross v. Lewis*, 2 B. & Cress. R. 686; Gale & What. on Easem. 80.

⁴ Gale & What. on Easem. 80.

⁵ 2 Greenl. Ev. § 545.

the reservation is to the heirs and assigns of the grantor.¹

6. *Disabilities.*

§ 237. If the doctrine of adverse possession of an easement, cannot, in general, be applied to reversioners, during the continuance of the particular estate, it would seem *a fortiori* to be inapplicable to persons who are hindered from suing, by reason of their *legal disability*. *Contra non valentem agere currit præscriptio*,² is a maxim which naturally suggests itself in this place, and which is illustrated by those express provisions in the different statutes of limitation, which, in cases of infancy, coverture, and others similar, suspend their operation, until the removal of such disability. As in the case of a debt due, the prescription only begins to run, from the time when the creditor has a right to institute his suit;³ for in such case to impute *delay* to the creditor, would be contrary to the conclusions of reason.⁴

¹ Butz v. Ihrie, 1 Rawle, (Penn.) R. 281.

² Poth. Traite des Obligations, 645; Ib. Traite Præscript.; Ayraud v. Babin, 19 Mart. (Louis.) R. 47; Richards v. Maryland Insurance Co. 8 Cranch. (U. S.) R. 84.

³ Broom's Legal Max. 700.

⁴ It has been the policy of the English legislature, at a modern date, to establish two periods of prescription, except in case of light. By the 7th sect. of the stat. 2 and 3 Will. 4, c. 71, (commonly called the "Prescription Act,") it is enacted as follows: — "That the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been, or shall be, an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until the death of any party or parties thereto, shall be excluded in the periods herein before mentioned, except in cases where the right or claim is hereby

§ 238. Yet, in commenting on the conclusiveness of the presumption, of which we are treating, Mr. J. STORY, in *Tyler v. Wilkinson*, remarked, that its operation had *never yet* been denied in cases where *personal disabilities* of particular proprietors might have intervened, such as infancy, coverture, and insanity; and where, by the ordinary course of proceeding, grants would not be presumed. But Mr. Matthews, in his *Treatise on Presumptive Evidence*, seems to consider, that the right otherwise arising from long enjoyment, may be repelled, by showing, that the parties whose interests have been prejudiced were until lately, incapable, by reason of infancy, coverture, or other legal disability, to give the necessary license. The Supreme Court of New Hampshire have expressly held, that, notwithstanding the remark of Mr. J. STORY, in *Tyler v. Wilkinson*,¹ a grant by a *guardian* of an infant, of an easement in the land of his ward, extending beyond the limit of the guardianship, was not to be presumed; inasmuch as a guardian is not authorized to grant incorporeal hereditaments out of the ward's land. "Perhaps," say the Court, "a disability intervening during the lapse of the term, but not extending to the termination of the period of twenty years, might not be sufficient to rebut the presump-

declared to be absolute and indefeasible." This has reference to an enjoyment of *twenty years*. The enactment, as to the longer period of *forty years*, materially restricts the Common-Law modes of defeating the effect of the user of an easement, declaring that user for *that* time, shall give an *absolute and indefeasible* right, notwithstanding any personal disability on the part of the owner of the servient inheritance, unless it shall appear that the same was enjoyed under some consent or agreement, by deed or writing. See the Act referred to and commented on, in *Gale & What. on Easem.* 68 – 75.

¹ *Tyler v. Wilkinson*, 4 Mason, (Cir. Co.) R. 402.

tion; but it would be absurd to presume a grant, where it was clear that no such grant could have existed. And in this case, a grant by a guardian, of an easement, in the land of his ward, extending beyond the limit of the guardianship, is not to be presumed.”¹

§ 239. Where a person claimed title to a several fishery, in the soil of another, on the presumption of a non-existing grant, and relied on the proof of adverse possession, for more than twenty years before the commencement of the action; the jury were instructed, that to raise such presumption of grant, it must appear that such exclusive right as the one claimed, had been used and enjoyed against those, who were *able in law* to assert and defend their rights, and to resist such adverse claim; and, therefore, if the persons against whom such right is claimed, were under the disability of infancy, the time during which such disability continued, was to be deducted, in the computation of twenty years. They were further instructed, that if they found that the adverse possession in the lifetime of the person in whose soil the easement in question was claimed, added to that which was held after his heirs became of age, (there having been no interruption in the mean time,) amounted together to the period of twenty years’ adverse possession, then they should find for the plaintiff. This instruction was excepted to and made the ground of a motion for a new trial, at which WILDE, J., who delivered the judgment of the Court, said, — “These instructions are manifestly cor-

¹ *Watkins v. Peck*, 18 N. Hamp. R. 360. The Court cite *Gilb. Eq. R. 3*; *Guernsey v. Rodbridges*, cited 2 Cowen’s *Phil. on Ev.* 383.

rect, and it is not denied, that the evidence was such as would warrant the jury to find a verdict in pursuance thereof, for the plaintiff, provided the use and enjoyment by the plaintiff, and that by those under whom he claims, may be coupled, so as to make up the twenty years, notwithstanding the intervention of the rights of Fletcher's heirs and their disability; and we have no doubt they may. If it were otherwise, it would be difficult to maintain the presumption of a grant, by any lapse of time, and continuance of possession, if death should intervene in every period of twenty years; so that a man and his ancestors, might have the uninterrupted use and enjoyment of an easement, or privilege, for a century, without acquiring any right; which cannot be maintained. It is admitted, that no authority has been found, to sanction such a doctrine, and very clearly it cannot be supported on principle."¹

7. *Extinction of Presumed Water Rights.*

§ 240. First, a prescriptive or presumed right to a Watercourse, may become lost or extinguished, by a non-user, for such length of time, as that which created it.² It is laid down by Bracton, that an incorporeal right, may be both acquired by long enjoyment, and lost by disuse and neglect.³ "Seeing," says Domat, "a service may be acquired by prescription, with *much more* reason may a freedom from a service be acquired in the same way. Thus, he who had a right

¹ *Melvin v. Whiting*, 13 Pick. (Mass.) R. 184.

² 3 Kent. Comm. 448; *Shiels v. Arnt*, 3 Green, (N. J.) Ch. R. 234.

³ Bract. lib. 4, c. 38, § 3.

to water, both by day and night, loses the use of it in the night time, if he lets it prescribe.”¹ This is the well-settled doctrine of the Common Law, and it has been expressly held, that ancient windows, which have been discontinued for twenty years, lose their former right.²

§ 241. It has been said by a learned Judge, (C. J. ABBOTT,) that, “One of the general grounds of presumption, is the existence of a state of things which may be most reasonably accounted for, by supposing the matter presumed. Thus, the long enjoyment of a right of way, by A, to his house or close, over the land of B, which is a prejudice to the land, may most reasonably be accounted for, by supposing a grant of such right, by the owner of the land; *and if such right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for, by supposing a release of the right.* In the first class of cases, therefore, a *grant* of the right, and in the latter, a *release* of it, is presumed.”³ The language of the Court of Appeals, of Maryland, is to the same effect, “If therefore, say they, “the adverse user of a right of way over the lands of another, for twenty years, shall be a sufficient foundation to pre-

¹ Domat's Civil Law, b. 1, t. 12, s. 1. Libertatem servitutum usu capi posse verius est. Dig. L. 4. Itaque si cum tibi servitutem deberem, ne mihi puta liceret, altius ædificare, et per statutum tempus altius ædificatum habuero sublata erit servitus. Dig. de servit. præd. urb. Si is qui nocturnam aquam habet, interdiu per constitutum ad admissionem tempus usus fuerit, amisit nocturnam servitutem, qua usus non est. Idem est in eo qui certis horis aquæ-ductus habens, aliis usus fuerit, nec ulla parte earum horarum. Dig. L. 10, quemad. servit. amitte.

² Lawrence v. Obee, 3 Campb. R. 514.

³ Doe v. Hilder, 2 B. & Ald. R. 791.

sume, that the right originated in a grant, it must follow, upon every principle, that the user of the right may be extinguished, by presuming a release of it, for the purpose of quieting possession." In this case, the presumption of a release was strongly fortified by the circumstance, that the parties to whom the right of way in question was originally granted, and those claiming under them, had used another and distinct route of the defendant's land.¹

§ 242. By virtue of this doctrine, if an ancient ditch has at one end opened into a watercourse, and the owner of a mill on the stream has kept the opening at the end of the ditch closed, without interruption, for twenty years, the mill-owner will have a right to keep it closed, and the owner of the land on the ditch would not be justified in re-opening the communication; although it might appear, that the communication between the ditch and the watercourse was ancient; and so where the owner of a mill worked by a ground-shot wheel, at a low head of water, altered the wheel to a breast-shot wheel, which required a high head of

¹ Wright v. Freeman, 5 H. & Johns. (Md.) R. 467. In Hoffman v. Savage, 15 Mass. R. 130, the action was in case for interrupting a right of way, claimed by the plaintiff, which had been assigned to a dowager, over land of her husband; and the interruption complained of, was the erection of a wooden building, upon the soil where the way was before used. The injury complained of, was committed more than twenty years before the commencement of the suit, and the adverse occupation continued from the time of bringing the action. This, the Court held, would be presumptive evidence of an extinguishment, or grant of the privilege to the tenant of the land. The non-user of a highway for twenty years, is *prima facie* proof of a release of the public, to the owner of the soil; and, therefore, where bars across a highway had been kept up by the owner of the soil about *ninety years*, it was held, that evidence of this fact was admissible to prove an extinguishment of the public right. Beardlee v. French, 7 Conn. R. 125. See also 2 Bay, (S. C.) R. 280.

water; and after that, for twenty years and more, discontinued the use of the breast-shot wheel, and resumed the use of the ground-shot wheel, the discontinuance, it was held, caused the mill-owner to lose his right to the higher head of water.¹

§ 243. As an enjoyment for the *full period* of twenty years, is necessary to found a presumption of a grant, the general rule is, that there must be a similar non-user, to raise the presumption of a release.² In *Corning v. Gould*, in New York,³ Mr. J. COWEN, in giving the judgment of the Court, considered it perfectly well settled, that in order to make out an effectual answer to a claim upon the ground of a simple non-user of an easement, the enjoyment, and all acts of enjoyment, must have totally ceased for the same length of time, that was necessary to create the original presumption. "We are to inquire first," says he, "was the way used continuously and adversely for twenty years. If so, the presumptive title becomes vested. Secondly, has the use, then, been *altogether discontinued for twenty years*? If not, there is no abandonment."⁴ In Massachusetts, a mill privilege cannot be considered as abandoned or extinguished by disuse, until such disuse, entire and complete, has continued for twenty years;⁵ and in Pennsylvania, as it takes *twenty-one* years' adverse enjoyment, to acquire a right,⁶ so it takes twenty-one years' non-user to extinguish it, and twenty years alone is insufficient.⁷

¹ *Drewett v. Sheard*, 7 C. & Payne, R. 465.

² 3 Kent, Comm. 448; *Curtis v. Jackson*, 13 Mass. R. 507.

³ *Corning v. Gould*, 16 Wend. (N. Y.) R. 531.

⁴ *Corning v. Gould*, 16 Wend. (N. Y.) R. 531.

⁵ Per Shaw, C. J., in *Hurd v. Curtis*, 7 Met. (Mass.) R. 94.

⁶ See Ante, § 209.

⁷ *Dyer v. Depui*, 5 Whart. (Penn.) R. 584.

§ 243, *a*. But it seems now to be well understood, that courts are not to proceed on the ground that as twenty years' user, in the absence of an express grant, is necessary for the acquisition of an easement, so twenty years' *cesser* of the use, in the absence of any express release, is necessary for its loss. But as an express release of the easement would destroy it at any moment, so the *cesser* of use, coupled with *any act clearly indicative of an intention to abandon the right*, would have the same effect without reference to time. It is not so much the duration of the *cesser*, as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him.¹

§ 244. The doctrine that the disuse of an easement, acquired by prescription, *must* have continued for the same length of time, which was required for its creation, has been held not to apply to *ancient lights*. In *Moore v. Rawson*,² ABBOTT, C. J., in delivering his judgment, said, — "It seems to me, that if a person entitled to ancient lights, pulls down his house, and erects a blank wall in the place of a wall, in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him, at least to show, that at the time when he so erected the blank wall, and thus apparently abandoned the win-

¹ Per Lord C. J. Denman, in *Regina v. Chorley*, 12 Adol. & Ell. R. (N. S.) 515.

² *Moore v. Rawson*, 3 B. & Cress. R. 332.

dows, which gave light and air to the house, that was not a perpetual, but a temporary abandonment of the enjoyment." LITTLEDALE, J., said, — "I think that if a party does any act to show that he abandons his right for the benefit of that light and air, which he once had, he may lose his right in a much less period than twenty years ;" and BAYLEY and HOLROYD, Js., were of the same opinion. It was, however, urged, in the subsequent case of *Bridges v. Blanchard*,¹ that, as the party could only acquire the right by twenty years' enjoyment, it ought not to be lost, without disuse for the same period ; and that, as enjoyment for such length of time is necessary for the presumption of a grant, there must be a similar non-user, to raise a presumption of a release. All this reasoning, said Mr. J. LITTLEDALE, might well apply to a right of common, or of a way ; but that there was a material difference between the mode of acquiring such rights, and a right to light or air ; the latter was acquired by mere *occupancy* ; whereas, the former could only be acquired by *user*. A way, said he, over the lands of another, can only be used in the first instance, with the consent, express or implied, of the owner ; and a party using the way, without such consent, would be a wrongdoer ; but with respect to light, it is otherwise, as every man may erect, even on the extremity of his land, a building, with as many windows as he pleases.

§ 245. If the doctrine, that a *prescriptive* right to light, may be lost by a non-user, for a period less than twenty years, will not apply to a right of common, or of a way, *a fortiori*, it will not apply to a *natural* water-

¹ *Bridges v. Blanchard*, 1 Adel. & Ell. R. 356.

course. Yet, Mr. C. J. TINDAL, in delivering the judgment, in *Liggins v. Inge*,¹ inquires, — “Suppose a person who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return, could it be that the owner of other land adjoining the stream, might not erect a mill, and employ the water so relinquished; or that he should be compellable to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own?” He answers, that, in such a case, “it would, undoubtedly, be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or left it for a temporary purpose only.” The learned Judge here proceeds upon the assumption, that a right to a particular use of the water, may be acquired by mere *occupancy*; that the riparian proprietor who *first* occupies, gains rights which he would not otherwise have; and then he says, “there is nothing unreasonable in holding, that a right which is gained by occupancy, may be lost by abandonment.” But we have already had occasion to show it to be clearly settled in England, that no appropriation, except for such a period as will confer an easement, (twenty years,) can diminish the *natural* rights of the other riparian proprietors, along the course of the stream;² and every riparian proprietor, who claims a right, either to throw the water back above his land, or to diminish the quantity of water, which is to descend below, must, in the words of Sir J. LEACH,³

¹ *Liggins v. Inge*, 8 Bing. R. 693.

² *Ante*, § 180 – 136.

³ In *Wright v. Howard*, 1 Sim. & Stu. Ch. R. 190.

“in order to maintain his claim; either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years.¹

§ 246. It has been considered by Courts in America, that Mr. Justice LITTLEDALE, when he says,² that when twenty years might be necessary to extinguish the right to a common or way, evidently did not advert to the distinction between a mere non-user, and a *positive obstruction*; and that all the Judges lay great stress on the possible injury to purchasers of the adjoining premises, who might come in on the faith of an appearance of one. In *Corning v. Gould*,³ the Court were entirely at a loss to see why LITTLEDALE, J., should have hinted in *Moore v. Rawson*, that twenty years' *obstruction* might be necessary to extinguish or bar a way or common, more than a servitude of light to an ancient window. They reason, that both are acquired by the same prescriptive term; and both are, when acquired, equally in the class of incorporeal hereditaments; and the actual deception upon a purchaser, is an important ground of decision.

§ 247. The rule of the Civil Law, most undoubtedly is, that the party himself, to whom *any* sort of servitude is due, may, *short of the period of prescription*, effect its extinguishment, by merely suffering the erection of obstructions of a permanent and solid kind, such as edifices and walls; and, *a fortiori*, if the act of obstruction be done by the party to whom the servitude is due.⁴ The rule of

¹ See also *Menzies v. Breadalbane*, 3 Bligh, R. 414, (N. S.)

² See Ante, § 244.

³ *Corning v. Gould*, 16 Wend. (N. Y.) R. 531.

⁴ 3 Kent, Comm. 448. When neither a *dies ad quem* nor a *conditio resolu-*

the Common Law, as laid down by KENT, is, — “If the act which prevents the servitude, be incompatible with the nature or exercise of it, and be by the party to whom the servitude is due, it is sufficient to extinguish it; and if it be extinguished for a moment, it is gone forever.”¹ Again, says he, “it is a wholesome and wise qualification of the rule, considering the extensive and rapid improvements that are everywhere making upon real property.”

§ 248. The great American case on this head, and the one on which the learned author above referred to, founds his doctrine, is that of *Taylor v. Hampton*, in South Carolina.² In that case, General Wade Hampton, the defendant, had purchased of Mr. Charles Pinckney, in 1807, 115 acres of land, with a mill-pond, dam, and mill in full operation, which continued till 1814. The pond flowed the land of the plaintiff; and there was no dispute that the defendant had a right to this flow, as a servitude by prescription. In 1814, a new mill was erected by the defendant, above the place where the old mill stood, upon which the water of the old mill flowed; wherefore the lower dam was cut, the water let off, and its use as a mill abandoned. This dam was, however, immediately repaired, and the water raised,

lutira has been specified by agreement, or by law, with respect to the termination of servitudes, they will become extinct by renunciation, (*remissio*), on the part of the entitled party, which may be either express or implied.

1 Kauff. Mack. 350. And see Dig, 8, 6, 5; Toullier's *Droit, Civil Français*, tome iii. n. 673; *Repertoire de Jurisprudence par Merlin*, tit. “Servitude,” in which that article is composed with great care. Civil Code of Louisiana, Art. 815, 816. *Haight v. Morris Aqueduct*, (Proprietors of,)

4 Wash. (Cir. Co.) R. 601.

3 Kent, Comm. 449.

2 *Taylor v. Hampton*, 4 McCord, (S. C.) R. 96.

occasionally, for the purpose of flowing rice ; but in the main, the plaintiff's land was eased of the former flow, from 1814 to 1823, when the upper mill was burned down, and the old mill was rebuilt in the former place ; the water being again permanently raised, and the flow resumed over the plaintiff's land. The verdict being for the plaintiff, in a suit for that injury, on a motion for a new trial, Nott, J., delivered the opinion of the Court. He stated the main question to be, whether the erection of the upper mill, the existence and enjoyment of that, being incompatible with the use of the other, by means of this pond, did not extinguish the right of flow formerly held by the defendant. After looking extensively into the learning of the Civil and the Common Law, in respect to the extinguishment of servitudes, he comes to the conclusion, that it did. He shows that the act of the party entitled to the servitude, is to be taken strongly against him ; and not only by the Civil Law, but by the Common Law, and analogous doctrines of our Courts of Equity, it shall be held to work an extinguishment, where the same circumstances, were they the result of the law, or of inevitable accident, would be a mere suspension. "Where," says the learned Judge, "a right is suspended by the act of God, as by the drying up of the spring, it will revive again, if the spring chance to flow ; but if it be suspended by the act of the party, as by building a house or wall, it would not be restored, even though the obstacle should be removed by a stroke from heaven." It appears in the course of the opinion, that the plaintiff had purchased the land flowed, intermediate to the erection of the upper mill, and the restoration of the lower pond, perhaps in 1817, though, by the statement of the case, (probably a misprint,) it seems to have been 1807. On

this, the Judge proceeds, "I think it not unimportant, that the present plaintiff was a purchaser for a *bona fide* consideration, at the time when the defendant had thus proclaimed to the world, that the privilege which he now claims, was useless, and even incapable of being enjoyed by him."

§ 249. The learned Judge in the above case, adopts as one illustration, the rule as above laid down, in respect to the extinguishment of a prescriptive right to ancient lights, and says,—"Suppose a person to be the owner of a house with ancient lights, which no person has a right to obstruct. If he erect a house, or put up a wall, directly covering his windows, has he not extinguished his light, as effectually, as if he had blown out his candle. Surely, then, it would amount to a license to his neighbor, to put a similar building on his adjoining lot. Suppose A to have a right of way over the land of B. If he erect a house on his own land, in such a manner as to obstruct the passage into the lands of B, does he not effectually destroy his right of way? Can he claim a right, the enjoyment of which he has rendered impossible by his own act." Again, "suppose," says he, "in the case before us, the defendant, instead of purchasing a mill-pond, with the right of flowing the plaintiff's land, had purchased arable land, with a right of way, to haul away his crop. If he had erected the mill which he now has, and thrown the whole of his land under water, by converting it into a pond, would he not have destroyed his right of way?" The learned Judge considered the question before him one of great public interest, and that it was time it should be settled upon some known and fixed principles.

§ 250. The doctrine, and the reasoning in the above

case of *Taylor v. Hampton*, was deliberately considered and adopted by the Supreme Court of New York, in the case of *Corning v. Gould*; ¹ a case in which it was expressly held, that the encroachment by one party upon a *way*, held in common, by building part of the wall of a house upon a portion of it, and inclosing another portion, by a fence, work an *extinguishment*, by operation of law; especially where the other party sells his interest after such acts done, and the purchaser, on his part, acquiesces in, and confirms what has been done: that where a party relinquishes the enjoyment of an easement or servitude, it lies with him to show an *intention to resume* the use of it within a *reasonable time*; and where there are no circumstances intimating the suspension to be *temporary only*, a *bona fide* purchaser will be protected in the enjoyment of the property, *as it appeared* at the time of his purchase.

§ 251. The same doctrine was discussed by the Supreme Court of Massachusetts, in *Dyer v. Sandford*,² which was an action on the case, for damage alleged to have been done by the defendant, in erecting a house on his own land, in such a manner, as to obstruct the light and air which the plaintiff was entitled to, through his staircase window. This was not claimed as a right by prescription for light and air through an ancient window, but as a right reserved in a deed from Nathaniel T. Tilden, administrator of the estate of Christopher Tilden, under which the plaintiff claimed, to Thomas Davis, under whom the defendant claimed. 1. The defendant offered evidence, tending to show that Eliza-

¹ *Corning v. Gould*, 16 Wend. (N. Y.) R. 531.

² *Dyer v. Sandford*, 9 Met. (Mass.) R. 395.

beth Tilden, the widow of Christopher Tilden, having a right of dower in the estate, and being in the occupation, gave a license, by parol, to Thomas Davis, to erect a building, in such manner as to obstruct the air and light, in whole or in part; also that some obstructions were afterwards erected, by persons in the occupation of the defendant's estate, extending to a period of ten or twelve years; and upon these facts, if established, contended that it ought to be submitted to the jury, to prove a license, by the owners of the plaintiff's estate, to the owners of the defendant's estate, to shut out and obstruct the light from entering said window; and that such license was not revocable by the plaintiff. He also contended, that, in fact, the easement in question, if it ever existed, had been lost by non-user, and cessation of enjoyment; and that, if not so extinguished, yet the right to light and air was to such only as could be received, if the estate, derived by Davis from Tilden, and out of which the light was reserved, had been left open and unobstructed; which was the distance of about two feet from the window." Mr. C. J. SHAW, in giving the judgment of the Court, said,—“We think there is a distinction between an executed license, to impede or obstruct an easement of this description, and an abandonment of the easement. It may well be maintained, on the authorities, that the owner of a dominant tenement, may make such changes in the use and condition of his own estate as, in fact, to renounce the easement itself; and this may be relied on by the owner of the servient tenement as evidence of abandonment. So, if the owner of the dominant, grants a license to the owner of the servient tenement, to erect a wall which necessarily obstructs the enjoyment of the easement, and it is erected accordingly, it may amount

to proof of an abandonment of the easement. It is not a release, because it is by parol. But it results from the consideration, that a license, when executed, is not revocable ; and if the obstruction be permanent in its nature, it does, *de facto*, terminate the enjoyment of the easement. But the license is for the specific act only ; and if, when executed, it is of such a nature, as, *de facto* to destroy the easement, but is only temporary in its nature, or limited in its terms, then, as the easement is not released, when the obstruction erected in pursuance of such specific license, is removed, the owner of the servient tenement cannot erect another obstruction of the same, or of a different kind, without a new license. But as, by the rules of law, an easement is an interest in land, to be acquired and released only by deed, as between the parties respectively, when it is contended, that the owner of the dominant tenement has voluntarily abandoned his right, so as, *de facto*, to withdraw the encumbrance from the servient tenement, without a release to its owner, the proof must go to this extent : *First*, that the acts relied on, were voluntarily done by the owner of the dominant tenement, or by his express authority ; *secondly*, that such party was the owner of the inheritance, and had authority to bind the estate by his grant or release ; and *thirdly*, that the acts are of so decisive and conclusive a character, as to indicate and prove his intent to abandon the easement.¹ Various illustrations might be given of such conclusive acts of abandonment, as when one takes down the building in which a window was placed, and erects on the site a permanent tenement, so constructed, as not to require,

¹ Moore v. Rawson, 8 Barn. & Cress. R. 332, and 5 Dowl. & Ryl. R. 234.

or even permit, a window similarly situated; or when one grants an express license to do acts on his own land, the necessary effect of which is, to take away or impair the easement permanently, and the acts are done, accordingly.¹ In the present case, applying these principles to the subject, we are of opinion, that the evidence did not warrant the jury to find an extinguishment of the easement. The license in question, and the acts done under it, could not operate as a release, because not in writing; nor as an abandonment, because Elizabeth Tilden was not the owner of the inheritance, and had, at most, a right of dower in the premises, and the occupation, as guardian of her children, or otherwise; nor could it operate as proof of release, by adverse possession, because it had not continued a sufficient length of time."

§ 252. In the above case of *Corning v. Gould*, the Court consider that *abandonment* is a simple non-user of an easement, and that, in order to make out an effectual answer to the claim upon that ground alone, the enjoyment must have actually ceased for the whole period of twenty years. There are two writers, who incline with the Civil Law, to hold, that something beyond mere non-user for the prescriptive term is necessary to work an abandonment;² and undoubtedly it is so by the Common Law, where the easement has been created by *deed*. A distinction in this respect is recognized between an easement created by *deed*, and where it is created by *prescription*. An easement to become extinguished by disuse, must have been acquired by use,

¹ *Liggins v. Inge*, 7 Bing. R. 682, and 5 Moore & Payne, R. 712.

² 2 Evans's Poth. 136; 3 Kent, Comm. 448.

and the doctrine of extinction by non-user does not apply to servitudes, or easements created by *deed*. In the one case, mere disuse is sufficient, but in the latter, there must not only be disuse by the owner of the land dominant, but there must be an actual adverse user by the owner of the land servient.¹ In *White v. Crawford*, in Massachusetts,² it was directly decided, that an express grant, or reservation of a right of way, was not lost by a non-user for twenty years. And again, in *Arnold v. Stevens*, in the same State,³ it was held, that in the case of a grant by deed of the right to dig ore in the land of another, the mere neglect of the grantee, for *forty* years, to exercise the right, without any act of adverse enjoyment, on the part of the owner of the land, will not extinguish such right; and moreover, that the occupation and cultivation of the land, by the land-owner, during such period, are not evidence of adverse enjoyment of the right to dig the ore. The right to an easement, created by deed, may indeed remain dormant for a long time, and not be lost, and more especially, if from the nature of the right, and the express grant, it is apparent that it was not contemplated, that the owner of the right should exercise it at an early period.⁴ In the language of SUTHERLAND, J., "the presumption of a grant against written evidence of title can *never* arise from the *mere neglect* of the owner to assert his right."⁵

¹ *Nitzell v. Paschall*, 3 Rawle, (Penn.) R. 76.

² *White v. Crawford*, 10 Mass. R. 183.

³ *Arnold v. Stevens*, 24 Pick. (Mass.) R. 106.

⁴ *Yeakle v. Nace*, 2 Whart. (Penn.) R. 123; *Butz v. Ihrie*, 1 Rawle, (Penn.) R. 218.

⁵ *Doe v. Butler*, 3 Wend. (N. Y.) R. 149. When the grantee of a

§ 253. Secondly, another mode of extinguishment of servitude as incorporeal rights, whether acquired by actual or presumed grant, is that of *unity of possession*; the doctrine concerning which has been already considered.¹ With regard to its application to presumed grants, it has been adjudged in Connecticut, that an adverse enjoyment of water of one close, issuing from another, cannot exist where there is an unity of seisin and possession of both; and that, therefore, where A and B had adjoining closes, and A, having conducted water from B's close to his own, enjoyed it in a particular manner, for a less period than that limited for the right of entry upon land, and then conveyed his close in fee-simple to B; and B, after a few days' possession, re-conveyed it to A; and after which, A enjoyed the water, in the same manner he had done before for a period less, but, with the former period, making more than the time limited by the statute; it was held, that A, in consequence of such enjoyment of the water, so interrupted, acquired no right thereto by *user*.²

8. *Public Rights.*

§ 254. The doctrine of the acquisition of right to easements, by uninterrupted and adverse enjoyment, is

market, by *letters-patent* from the crown, suffered another to erect a market in his neighborhood, and to use it for the space of twenty-three years, without interruption, it was adjudged, that such user operated as a bar to an action on the case, for a disturbance of his market. *Holcroft v. Heel*, 1 Bos. & Pull. R. 400; and see *Yard v. Ford*, 2 Wms. Saund. 175, and note.

¹ See Ante, § 191 -200.

² *Manning v. Smith*, 6 Conn. R. 289.

not applicable to rights of a *public* nature ; and all encroachments upon privileges, which are open to the whole community, though they may have been uninterruptedly prolonged, for a period exceeding twenty years, are, nevertheless, liable to be suppressed.¹ “No laches,” said Ch. J. PARSONS, “can be imputed to the government, and against it no time runs so as to bar its rights.”² It has been accordingly adjudged, in Great Britain, in *Vooght v. Winch*,³ that twenty years’ exclusive enjoyment of the water of a river, which is a *public highway*,⁴ created no title. So much regard, indeed, is paid to the interests of the great body politic, that if a river ever has been a public highway, (even if it has not been used as such for the period of twenty years, and during the whole time has been in a condition inconsistent with the public use,) the right of the public is not extinguished.⁵ An act of the legislature is the only means by which the interest, which the public may have in a watercourse, can be transferred ; or the proof of such a very great length of enjoyment, as might furnish ground for the presumption of such a mode of transfer.⁶

¹ *Weld v. Hornby*, 7 East, R. 195 ; *Carter v. Murcot*, 4 Burr. R. 2163 ; *Thinmo’s Ex’r v. Commonwealth*, 4 H. & M. (Virg.) R. 57 ; *Johnson v. Irwin*, 3 S. & Rawle, (Penn.) R. 292.

² *Stoughton (town of) v. Baker et al.* 4 Mass. R. 522.

³ *Vooght v. Winch*, 2 Barn. & Ald. R. 662.

⁴ As to what rivers are public highways, see *post*, Chap. XIII.

⁵ *Vooght v. Winch*, *ut supra*.

⁶ *Ibid.* ; *Chalker et al. v. Dickason et al.* 1 Conn. R. 382. In an action of trespass, for cutting down and removing a bridge over a navigable arm of the sea, alleged to be the property of the plaintiff, which bridge had been standing upwards of *fifty years*, the Court, in giving their opinion, said — “Public rights cannot be destroyed by long continued encroachment ; at least, the party who claims the exercise of any right, inconsistent

with the free enjoyment of a public easement or privilege, must put himself on the ground of *prescription* ; unless he has a grant, or some valid authority, from the government ; and a right by prescription does not exist in the present case. *Inhabitants of Arundel v. McCulloch*, 10 Mass. R. 70.

CHAPTER VII.

OF THE RIGHT TO THE USE OF THE WATER, AS DEPENDING
UPON CONTRACTS AND AGREEMENTS IN WRITING.

1. The Use subject to Special Agreement.
2. Contracts and Agreements by Specialty, and which run with the Land.
3. Contracts Personal.
4. Arbitrament and Award.

1. *The Use subject to Special Agreement.*

§ 255. By means of a special contract or agreement in writing, water rights may be created of a very limited nature, and subservient to the more general right of the riparian proprietors; and the extent and mode of the use of the water may be affected and determined by any considerations, conditions, and modifications, which the assent of the parties interested, may impose.¹ Instances are afforded, of *covenants*, intended to establish a limited property in a watercourse, and the rights and privileges appurtenant thereto, which have been the subjects of controversy, and of judicial investigation and decision. It may be premised, that the word "covenant," is not to be regarded as a word of art, and essential to the constitution of a covenant; and any words in the instrument, in whatever part found, from which the *intent* of the parties to enter into the engagement, can be collected, are regarded as effectual for that pur-

¹ Tyler v. Wilkinson, 4 Mason, (Cir. Co.) R. 397.

pose.¹ With reference to the nature of the estate on which, and the parties on whom, they are binding, they have been divided into *real* and *personal*. A covenant *personal*, relates only to matters personal, as distinguished from *real*, and is binding on the covenantor, during his life, and on his personal representatives, after his decease, in respect of assets. A covenant may also be personal, in a sense where it is to be performed personally, by the covenantor only.² *Collateral* covenants are such as concern some collateral thing that does in no way, or rather not so immediately, relate to the thing granted. They are not binding on assignees, though executors and administrators, in their representative capacity, are chargeable, in respect of a breach.³ A *real* covenant is one which has for its object something annexed to, or inherent in, or connected with land or other real property; and it is one which descends to the heir, and which is transferred to a purchaser. In other words, it is one which necessarily *runs with the land*.⁴

2. *Contracts and Agreements by Specialty, and which run with the Land.*

§ 256. A *real* covenant bears, therefore, a strong resemblance to an *easement*. Upon a grant confirming the easement of diverting water, the successive owners of the dominant estate⁵ become entitled to the benefit

¹ Bac. Abr. "Covenant."

² Platt on Cov. 67; 2 Wm. Black, R. 856; Cro. Eliz. 552.

³ Platt on Cov. 70; 5 B. & Ald. R. 7, 8, Opinion of Holroyd, J.

⁴ Cruise, Dig. tit. 32, c. 25, s. 22.

⁵ See Ante, § 141, 142, *et seq.*

of the right conferred, and may sue for a violation of it; and as a general rule, it may be considered, that all *implied* covenants run with the land. Thus, if a lessor demise and grant to his lessee a house or land, for a certain term, the law will imply a covenant on the part of the lessor, that the lessee, during the term, shall quietly enjoy the same, against all encumbrances;¹ and if the assignee of the lessee be evicted, "he shall have a writ of covenant."² An express grant of a water-course, implies a covenant on the part of the grantor, not to disturb the grantee, his heirs or assigns, in the enjoyment of it.³

§ 257. But whether a particular express covenant which *touches* or *concerns* land, is a real covenant, running with the land, is not unfrequently a question of difficulty.⁴ It has, however, been agreed, ever since Spencer's case,⁵ that to make an assignee of a covenantor liable to an action of covenant, there must be a *privity of estate*, or *contract*, between them; and it is said, there are three manner of *privities*, viz.: 1. Privity of estate only. 2. Privity in respect of contract only. 3. Privity in respect to estate and contract together. The first, viz.: privity of estate only, is between the grantee of the lessor's reversion, and the lessee, or between the lessor and the assignee of the lessee, for no *contract* was made between them. The second, privity in respect of contract of only, which is personal privity,

¹ Co. Litt. 884.

² Spencer's Case, 3 Co. R. 16, and notes to same, in 1 Smith, Lead. Ca. (Amer. edit.) 96, 138.

³ 4 Kent, Comm. 473.

⁴ Balley v. Wells, 3 Wils. R. 29.

⁵ Spencer's Case, *ub. sup.* See Webb v. Russell, 3 T. R. 402.

and extends only to the person of the lessor, and the person of the lessee, as between the lessor and the lessee *after* the latter has assigned over, for the privity of contract remains, although the privity of estate is destroyed; and yet this is between the lessor and lessee only, for in the very case, viz.: an assignment by the lessee, there is no privity of contract between the lessor and the assignee, but there is a privity of estate between them. The third, viz.: privity in respect of contract and estate together, as between the lessor and lessee himself.¹ Suppose that A should demise, by indenture, certain land on a watercourse to B, and that B covenants for himself, his heirs, &c., to build certain works or houses on the land; that B should underlet to C, and should covenant for himself, his heirs and assigns, to observe and perform, or effectually indemnify C against the covenants in the first indenture, and afterwards assigns his reversion to D; then suppose that A enters and ejects B, by reason of the non-performance of the first mentioned covenant, B's covenant with C does not run with the land, and D is not liable to C.

§ 258. It is obvious, that a covenant to build a mill or dam, on the land of a third person, is a mere personal covenant; but a contract to build a mill or dam on the land demised, will run with the land and bind the assignee, on account of the privity of estate between the contracting parties. Where such privity exists between the covenantor and covenantee, and the covenantor assigns his estate, the privity thereby created between the assignor and the other contracting party, renders

¹ 2 Sugd. on Vend. 467; Walker's Case, 3 Rep. 23 a.

the former liable on such covenants, as regulate the mode of occupying the estate.¹ And so, if the covenantee assigns his estate, his assignee will have the benefit of similar covenants. But if there is no privity of estate between the contracting parties, the assignee will not be bound by, nor have the benefit of, any covenants between the contracting parties, although they may *relate to the land* he takes by assignment, or purchase from one of the parties to the contract. In such a case, the covenants are personal, and are collateral to the land.² "There are, certainly, cases," says Mr. J. COWEN,³ "which seem startled at the comprehensive rules concerning assignable covenants, and which, therefore, seek to limit the number; and there are others which enable us still more clearly to see the legal partition between *real* and *collateral* covenants. It is not to be denied, however, (he continues,) that they still leave the application of the old principles to new cases, a very nice exercise of the mind, and remaining in a greater degree, a matter for judicial discretion, than almost any other of equal importance, in the law of property."⁴ But the authorities clearly demonstrate, that in order to make a covenant run with the land, whether the estate be granted for an estate of inheritance, or for a term of years, the performance or non-

¹ See *Doughty v. Bowman*, 16 Law Journ. 414.

² See the opinion of Wilde, J., in *Hurd v. Curtis*, 19 Pick. (Mass.) R. 459.

³ In *Norman v. Wells*, 17 Wend. (N. Y.) R. 136.

⁴ In the case just referred to, Mr. J. Cowen discusses at large the doctrine of inherent covenants, running with the land, and of an assignable character, in contradistinction to those which are collateral or personal; and the numerous authorities on the subject are fully and ably reviewed by him. And see 4 Kent, Comm. 472.

performance of it must affect the *nature, quality, or value*, of the estate conveyed, independently of collateral circumstances, or must affect the *mode* of enjoying it. It is clearly not sufficient, that the covenant concerns the land; but to make it run with the land, there must be enough to create a privity between the contracting parties.¹

§ 259. "Any one," says Mr. Justice COWEN, "would give more for a warranted farm, than for a succession of quitclaim deeds;"² and he cites Fitzherbert,³ who says:—"If at this day, a man granted to one common of estovers; or, of turbary in fee-simple, to burn in his manor, by that grant it is appurtenant to the manor, and if he make a feoffment of the manor, the common shall pass to the feoffee." From the example put by the second resolution in Spencer's case,⁴ of the lessee covenanting to build on land of the lessor, or pay a collateral sum of money, it appears that these acts are disconnected entirely with the idea of their being a rent or compensation for the use of the premises; otherwise, they would be taken as part of the rent, and run with the land. This was settled in *Vyvyan v. Arthur*.⁵ There was, in that case, a demise of certain land, at a money rent, and the lessee covenanted for himself and assigns, that he would grind all the corn grown on the premises, at the lessor's mill, standing in the neighborhood; and the Court held, that as long as the mill and the reversion remained in

¹ 1 Platt on Cov. 461; and see *Mayor of Congleton v. Pattison*, 10 East, R. 130.

² In *Norman v. Wells*, *ub. sup.*

³ Fitz. Abr. p. 181 of the folio, and 420 of the Dublin edit. of 1793.

⁴ *Spencer's Case*, 3 Co. R. 16.

⁵ *Vyvyan v. Arthur*, 1 B. & Cress. R. 410.

the same hands, the covenant should go with the lands; and that the assignee of both, might maintain an action on the covenant, although to be performed off the land. It has been said of the decision in this case, by a learned Judge,¹ that "it seems difficult to reconcile it with the second resolution in Spencer's case, and with other cases in which it has been decided, that a covenant of a lessee, to build a house upon the land of the lessor, not being parcel of the demise, is a collateral covenant, not binding on the assignee; the distinction may be between covenants of this sort, which are in the nature of rent, and those which are not. But however this may be, the decision does not impugn, but confirms the doctrine laid down in all the cases, that an assignee is not bound by, nor is he entitled to the benefit of a covenant, unless there is a *privity of estate* between the contracting party and his assigns."

§ 260. The assignee of a grantee, may maintain an action on the covenants of *warranty*, against the grantor, because they are prospective, and form a part of the value of the land,² but it does not necessarily follow, because a covenant runs with the land to an assignee, that, in no event, the assignor can maintain an action on the covenant, after he has assigned it. In conveyances of real estate, where there have been successive conveyances from A to B, and from B to C, each with covenants of warranty, upon the eviction of C he may maintain his action on the covenant of

¹ By Wilde, J., in *Hurd v. Curtis*, 17 Pick. (Mass.) R. 459.

² 4 Kent, Comm. 472, and see *Norman v. Wells*, 17 Wend. (N. Y.) R. 136; *Wyman v. Ballard*, 12 Mass. R. 304; *Sprague v. Baker*, 17 Ib. 586; *De Chaumont v. Forsythe*, 2 Penn. R. 507.

warranty, either against B or A, at his election. But if B shall pay to C his damages occasioned by such a breach of the covenant, B may then resort to A for damages on his covenant; and it would be no defence to A, to allege that his covenant to B ran with the land, and, therefore, passed to C. In the case supposed, the payment by B has discharged all liability of A to C, and therefore, B may well maintain his action against A. This doctrine was applied to a conveyance of a *mill* and *dam*, with a covenant to *keep in repair*. The mill was conveyed by A to B, and A covenanted with B, his heirs and assigns, to keep one half of the mill-dam in repair. The dam was afterwards carried away by a flood, and B, after having duly requested A to aid him in rebuilding it, conveyed the mill, with the privileges, &c., to C, who, at the same time, agreed in writing, that B should "have all that should be obtained of A, for non-fulfilment of his contract, provided A should not assist B in erecting the dam, and B should be compelled to rebuild it, without A's assistance." A afterwards refused to assist in repairing the dam, and B repaired it at his own expense. It was held, that B might maintain an action in his own name against A for breach of the covenant, to keep the dam in repair.¹

§ 261. In *Jourdain v. Wilson*, in the King's Bench,² a lessor covenanted to supply certain messuages and tenements demised, with a sufficient quantity of good water, at a certain rate per annum, for each house. The lease did not specifically point out the particular

¹ *Thompson v. Shattuck*, 2 Met. (Mass.) R. 615.

² *Jourdain v. Wilson*, 4 B. & Ald. R. 266.

mode by which the water was to be supplied; whether by pipes, by collecting the water in cisterns, or by carrying it to the premises by buckets; but the Court considered it quite clear, that the covenant could not be satisfied, unless a sufficient quantity of good water was brought upon the premises, during the term, and therefore they say, (by ABBOTT, C. J.,) the covenant respects the premises demised, and the manner of enjoyment, and therefore they held, that it was a covenant which runs with the land, and that the assignee might sue the reversioner for the breach of it.

§ 262. Where the owners of land granted a water-course through it, to a man and his heirs, and covenanted for themselves, their heirs, and assigns, to cleanse it, this covenant was held to bind the land in the hands of an assignee, for it was a covenant that ran with the land.¹ A covenant not to let or establish any other site on the same stream, to be used for a particular purpose, as for sawing mahogany, has been held to be a covenant running with the land, and that for a breach of it an action may be sustained by the assignee of the covenant. The covenant, said the Court, respected the premises, and was *co-extensive with the estate*; that it benefited the owner of the demised premises, and nobody but the owner.² So where several owners of mills and mill privileges, on the same waterfall, apportioned the water among themselves, and a certain part thereof was assigned to W., the owner of a fulling-

¹ *Holmes v. Buckley*, Prec. in Chanc. 39; 1 Eq. Ca. Abr. 27, pl. 4.

² *Norman v. Wells*, 17 Wend. (N. Y.) R. 136. It has truly been said, of this case, that it may be regarded as carrying the power of covenants to run with the land, to the extremest limits allowed by law. See note by the American editors, to *Spencer's Case*, 1 Smith's Lead. Ca. 134.

mill, for the use of that mill; it was held, that a subsequent conveyance of this right by W. to B., another mill-owner, entitled B. to use that right for a fulling-mill, as against A., one of the other owners.¹

§ 263. In the above cases, it will be observed, that the covenant was to do an act at a *future time*. But a covenant in a deed, that the land thereby conveyed, is free from all encumbrances, does not run with the land, and, therefore, an action for a breach thereof, cannot be maintained by an assignee of the grantee. Thus, in an action of covenant broken, the action was founded on the alleged breach of the defendant's covenant against encumbrances in his deed to the grantee, from whom the plaintiffs derived title. The breach alleged, was, that, at the time of the execution of the deed, the land conveyed was not free from encumbrances, but that the defendant had before that time granted a *right of way* over the land; which encumbrance, it was averred, still existed, and did exist at the time of making the deed. The Court said, that it appeared by the plaintiff's own showing, that the covenant relied upon was broken as soon as made; and held, that a covenant thus broken, did not, by the established doctrine of the Common Law, run with the land, so as to authorize the assignee to maintain an action; that he could not sue upon a breach of contract that happened before his time.² Again, A conveyed the privilege of drawing water from a pond, when the water should not be four feet below the top of the dam to be erected, and covenanted that he would erect the dam

¹ Hurd v. Curtis, 7 Met. (Mass.) R. 94.

² Clark v. Swift, 3 Met. (Mass.) R. 390.

ten feet high, and that he was seised of the granted premises, and that he had a right to sell and convey the same, and that he would warrant the same. It appearing that he had a right to raise the water six feet only, instead of ten, it was held, that nothing passed by the deed, and that covenants were broken immediately, upon its execution, and consequently were not assignable. "This easement," say the Court, "could not run with the land, for no land was granted; and, to make a covenant run with land, it is not sufficient that it is of or concerning land."¹

§ 264. In *Mitchell v. Warner*, in the Supreme Court of Errors of Connecticut,² the questions were, whether the plaintiff, claiming to be the assignee of the covenant of seisin, could sue upon it, and whether he could sue as assignee of the covenant of freedom, from encumbrances. The plaintiff alleged as a breach of covenant, that before the execution of the deed to him, one W. was well possessed of the right of *turning the water* of a certain brook, which run through the land conveyed, and was of great use in carrying a carding machine, and other water-works, which the plaintiff had erected thereon, and that W., in virtue of such right, took the water therefrom, and turned it on his meadow; by reason of which, the plaintiff lost the benefit of said stream of water, and the use of the works thereupon erected. It was held, that the action would not lie. In this case, HOSMER, C. J., examined the doctrine very fully, and he affirmed,—“that the novel idea attending the breach in the testator’s life-

¹ *Wheelock v. Thayer*, 16 Pick. (Mass.) R. 68.

² *Mitchell v. Warner*, 5 Conn. R. 407.

time, by calling it a continuing breach, and, therefore, a breach to the heir or devisee, at a subsequent time, is an ingenious suggestion, but of no substantial import. Every breach of a contract is a continuing breach, until it is, in some manner, healed; but the great question is, *to whom* does it continue as a breach? The only answer is, to the person who had title to the contract, when it was broken. A second supposed breach is as futile as the imaginary unbroken existence of a thing dashed in pieces. It has no analogy to a covenant to do a future act at different times, which may undergo repeated breaches.”¹

§ 265. Where a lessor covenanted for himself, his heirs, executors, administrators, and assigns, with his

¹ In the above case, the learned Chief Justice Hosmer, in giving his opinion, in this case, says, that the determination in the case of *Kingdom v. Nottle*, 4 M. & Sel. R. 53, was “against the ancient, uniform, and established law of Westminster Hall, and against well-settled principles and decided cases in the United States;” in which the Supreme Court of Massachusetts concurred, in *Clark v. Smith*, *ub. sup.* But the Court, in *Mitchell v. Warner*, went to the length of deciding, that a covenant of *warranty*, in a deed of land, did not embrace *water*, running over the land, and that the covenant was not broken by the existence of a right in a third party, to enter upon the land warranted, and draw off the water, nor by an actual entry and diversion of the water, in pursuance of such right; and that the assignee from the original grantee of the land, even if the circumstances amounted to a breach of the warranty, could not sue on it, since though it run with land, it could not run with water, and the action related to water. This doctrine is clearly not supportable. It has attracted the attention of the learned American editors of *Smith’s Leading Cases*, who there, in a valuable note to *Spencer’s Case*, reported in 3 Ca. R. 16, say, that “it would appear that the general principle, that covenants will not run with inheritances incorporeal, is not law;” and they refer to the well-considered decision, in the case of *Bally v. Wells*, 3 Wils. R. 26, which determined that covenants are as capable of running with incorporeal hereditaments, at Common Law, as with land. And see the opinion of Wilde, J., in *Clark v. Swift*, 3 Met. (Mass.) R. 390, and *Ante*, § 263.

lessee, to permit him to make a drain to convey the waste water from the houses demised to the main shore, and the covenantor had previously assigned the lands intervening between the demised premises and the main shore, to a stranger, who refused his permission for that purpose; the Court held, that an action could not be supported against the lessor, the disturbance being alleged to be by an assignee, who came in before the demise.¹

§ 266. A collateral covenant, or one that is personal and not annexed to the estate, we have already said, does not run with the land.² Thus, the several owners of mills, drawing water from the same stream, by means of the same dam, entered into an indenture, in which, for themselves, their heirs, &c., respectively, they covenanted with each other, and their respective heirs, &c., that they would erect and use wheels of a certain construction; and it was held, that there was no privity of estate between the parties to the indenture, and, consequently, that the covenant did not run with the land, and bind the grantee of one of the mills.³ So in the lease of a mill, the lessee covenanted for himself and his assigns, that he would not employ in his labor at the mill, persons settled out of the parish; and this was held to be collateral, and not binding on the assignee.⁴

§ 267. Sometimes the covenant does not extend to the subject in dispute, as where a covenant that the

¹ *Turget v. Lloyd*, 2 Ventr. R. 277.

² See the opinion of Cowen, J., in *Norman v. Wells*, 17 Wend. (N. Y.) R. 139.

³ *Hurd v. Curtis*, 19 Pick. (Mass.) R. 459.

⁴ *Mayor of Congleton v. Pattison*, 10 East, R. 130.

seller was seised in fee, was held not to extend to a covenant that the purchaser might draw water at a well; so that it was no breach of the first covenant, that the seller was not seised in fee of the well.¹

§ 268. In *Collins v. Plumb*,² where the vendor was possessed of some water-works, and was seised of a freehold house, with a well, and conveyed the house and well to a purchaser in fee, who covenanted for himself, his heirs, and assigns, not to sell the water from the well, to the injury of the proprietors of the water-works, their heirs, executors, administrators, and assigns, Lord Eldon, without giving any opinion whether the covenant ran with the land, refused to interfere to uphold the covenant; because, in every instance, the question would be for a jury, whether the act was done to the injury of the water-works; as, therefore, the seller had thought proper not to reserve the well, but to rest upon the covenant, there was the covenant, and the parties must make what they could of it.

§ 269. Two tenants in common, were owners of twelve acres of ground, through which they had dug a race or canal, from the river Schuylkill, who divided the property, by a boundary crossing the canal, reserving to each, his heirs and assigns, the common use and privilege of the canal, as thereafter mentioned. By a subsequent clause, they declared the same should be, and remain for the common use and privilege of the respective parties, their heirs and assigns, tenants and occupiers of the respective lots of ground through

¹ *Butterfield v. Marshall*, Lutw. R. by Niels, 192, cited, 2 Sugd. on Vend. 522.

² *Collins v. Plumb*, 16 Ves. R. 454.

which the same passed, as a passage for scows and boats, and for the introduction of the Schuylkill water from the dam, for the use of the respective premises ; but neither of them, their heirs or assigns, should, at any time thereafter, use more than one full equal half part of the water power of said river, to which they were previously jointly entitled ; nor would they, their heirs, &c., put, or permit to be put thereon, any boat or scow, of larger dimensions, than would admit another of equal dimensions, freely to pass it ; and that neither of them, their heirs, &c., should permit the water or water power, to which they were respectively entitled as aforesaid, to be used or applied otherwise than upon their respective lots, nor carry, or permit to be carried on upon the same lots, the manufacture of gunpowder, or any part of the process of the manufacture of that article. It was held, first, that this deed did not give to a party the right to carry coal along the canal, and load it on his half of the premises, for the supply of a steam-mill, occupied by him, and situated on another and distinct lot, in the neighborhood ; secondly, that the privilege of the canal, under this partition, was *not a personal one, but appurtenant to the property divided* ; and, thirdly, that, in a suit for a misuser of the privilege, it was no answer that the plaintiff was guilty of a similar misuser.¹

§ 270. The assignee of a covenant, for the liberty of bringing water to the city of London, though the word "assigns" was not mentioned, was held chargeable, in equity, with the covenants in the original lease or contract, as an equitable assignee, upon an equitable pri-

¹ Jamieson v. McCredy, 5 Watts & S. (Penn.) R. 129.

vity of estate, like the assignee of a bond. The city of London articulated with A. to lay a leaden pipe, for the carrying of water to Cheapside, and while this was doing, the city agreed with H., to grant him a lease of the water, for which he was to pay a certain rent, for fifteen years, and a lease was accordingly made. A bill in equity was brought against R., and others, the assignees of the lease, to have the arrear of rent paid, and the growing rent, and the performance of H.'s covenants in the lease. It was objected, that the plaintiff had not proper parties, for H., the lessee, who had assigned over, was liable, and was no party. Secondly, it was urged, that the defendants, as assignees, if liable, were liable at law, and the plaintiff should sue there; and that there was no good ground to be further liable in equity, than they were at law; and an assignee may, by law assign over, and be no longer liable. To which it was answered, that possibly the assignees might not be liable at law, if it was an incorporeal inheritance, for they had no *privity* of estate; yet they, enjoying the thing demised, ought, in equity, to be answerable for the rent. The decree was, that the assignees of the lease should pay the rent due since the assignment, and which should become due while they continued in possession; but not during the continuance of the lease; for they might, if they could, get rid of the lease, by assigning it to another.¹

§ 271. So, when such a question arises in a Court of Law, the interest will be held assignable, when such

¹ City of London v. Richmond, 2 Vern. R. 421. The decree was affirmed by the High Court of Parliament. 1 Brown, Parl. Ca. 30.

was evidently the intent of the parties. In *Kennedy v. Scovil*, in Connecticut,¹ the question arose upon a reservation, in a deed of conveyance of a watercourse, the right reserved by the grantors being reserved without naming their assigns; and it was held by the Court unanimously, that the grantors, after the conveyance, had no assignable interest in the use of the water conveyed. "It is true," say the Court, "the right is reserved to them, (the grantors,) without words of inheritance, and without naming their assigns; but it becomes material to inquire for what purpose the reservation was made. It was '*for the necessary accommodation and use of the old shop.*' Of this they were the owners in fee-simple; and can it be supposed, that they meant to limit the use of the water, (without which the establishment was of no value,) to their own personal occupancy? The idea is opposed to every presumption, and to all probability." And the Court added, that they knew of no rigid rule of construction that prevented them from giving effect to the intention of the parties; and they considered the matter entirely free from doubt.

§ 272. It is generally considered, that, by the principles of the Common Law, the *heir* is not bound by the covenant of his ancestor, unless it be stipulated by the terms of the covenant, that it shall be performed by the heir; and unless assets descend to him from his ancestor, sufficient to answer the charge. If, therefore, the heir be not named in the covenant, it will be binding only upon the covenantor, his executors and administrators; although the heir may take by descent

¹ *Kennedy v. Scovil*, 12 Conn. R. 317.

from the covenantor assets sufficient to answer the claim. But this rule is not to be applied to real covenants running with the land granted or demised, and to which the covenants are attached, for the purpose of securing to one party the full benefit of the grant or demise; or to the other party the consideration on which the grant or demise was made. Such covenants are, at law, regarded as inherent in the land, and will bind the heir and assignee, though he is not named; for, as he is entitled to all the advantages arising from the grant or demise, it is but reasonable that he should sustain all such burdens as are annexed to the land.¹ The case of *Morse v. Aldrich*, in Massachusetts,² was decided, in reference to these principles, which were decisive of the action. In that case, neither heirs or assigns were mentioned; but it appeared, by the deed of S. C., the defendant's ancestor, to W. H., that the former conveyed to the latter a tract of land adjoining the mill-pond in question, "with the full and free privilege of using and improving the said mill-pond, within certain limits, with the full liberty of ingress and egress, to dig out and carry away the whole, or any part of the soil in said pond, and to divide the same pond, as described in the deed, into six separate and distinct fish-ponds." W. H. conveyed the premises to the plaintiff; after which, disputes arose between S. C. and the plaintiff, relative to their respective rights, and for settling the same, they entered into sundry covenants, in relation to said grant, and qualifying the same. By the one for the breach, of which

¹ Platt on Cov. 62, 449; *Bally v. Wells*, 3 Wils. R. 29.

² *Morse v. Aldrich*, 19 Pick. (Mass.) R. 449.

the action was brought, it was covenanted by S. C., (without mentioning his heirs or assigns), that he would draw off said pond, when requested by the plaintiff, six days in each year, for the purpose of giving the plaintiff an opportunity of digging and carrying away mud. S. C. died, and his estate in the mill-pond descended to the defendant. It was held, that the covenant was a real covenant, running with the land, and was binding on the heirs of the covenantor.

2. *Contracts Personal.*

§ 273. An action may be maintained upon a personal contract for the use of water power, whether under seal or not; but in construing all such contracts, to determine whether there be a breach, especially when expressed in general terms, it would not always conform to the intent of the parties, to construe every stipulation literally. Implied qualifications and exceptions are obviously necessary, to carry into effect the intention of the parties, to be collected from the whole contract, and to be examined under the lights thrown upon it by the obvious *purposes* and *objects* to be accomplished by it. An instance is given by C. J. SHAW : — “ Should a party having possession of a manufactory with water power only, stipulate with another having adjoining premises, to furnish these premises with water power, during all regular working hours for several years, without exception, it is to be presumed that they know that such water power may be, and must necessarily be, occasionally interrupted; that on a few very cold days in the winter, the ice will so clog the wheel, that it may take several hours to clear it; that a freshet may carry away a gate, which

will take a few days to replace; and the covenants, though in general terms, are to be taken with necessary and implied exceptions. What are to be deemed occasional interruptions, and what a reasonable time to remove them, must depend upon the subject-matter, the knowledge and experience of those conversant with the subject, and all the circumstances of the case, as applied to the subject-matters, and the nature and terms of the contract.”¹ Where the stipulation was to give the exclusive use of a particular *water-wheel*, it was held, that a mere temporary and inconsiderable suspension of water power, not manifesting any deliberate purpose on the part of the party stipulating, to withdraw or withhold the power, would not amount to a neglect or refusal to furnish power, which would constitute a breach of the contract; but to have that effect, it must be a *substantial* refusal or neglect.

§ 274. In *Mill-Dam Foundry v. Hovey*, in Massachusetts,² the action was *assumpsit*, and was held proper, though founded on a contract under seal; that is, the original indenture was under seal, but was afterwards altered and modified by a contract not under seal. The plaintiffs were the owners of works for the manufacture of iron, which were carried on by a water power, held by them under a lease; and the lessors were bound to keep the dams in repair. By an indenture made in April, 1833, between the plaintiffs and the defendant, the defendant covenants to manufacture for the plaintiffs ten thousand dozen of plane-irons, by the 1st of July, 1834, and to keep in

¹ *Mill-Dam Foundry v. Hovey*, 21 Pick. (Mass.) R. 417.

² *Mill Dam Foundry v. Hovey*, *ub. sup.*

order all the tools used in the business, accidental breakage of some of them excepted; and in consideration thereof the plaintiffs covenant to furnish all the iron and steel and other materials, as soon and as often as shall be reasonably required by the defendant to enable him to carry on the manufacture to the best possible advantage, and they agree "to give him (with the exception of the power conveyed to the boiler-house as now used) the exclusive use, or an equivalent thereto, of the south water-wheel, drums, gears, belts, &c., belonging thereto, during regular working hours, whilst he is employed in making said plane-irons, they to keep the same in good repair, and to furnish him and to give him the control of all the tools, machinery, room, and furnaces now in use, or which may be added to the plane-iron establishment; and they agree to make good all breakages (except of shear knives, tongs, and other small articles) that may happen to said tools and machinery, without delay; and to advance to the defendant such sums of money as shall enable him to settle with all such of his hands as conform to the rules of the plaintiffs, on such terms as they settle with their own hands;" and it is stipulated, that the defendant shall receive a certain sum for every dozen of plane-irons so manufactured by him; and that the plaintiffs shall reserve, at all times, a draw-back for such sums as they shall have advanced in paying his workmen, &c., until all such advances shall have been reimbursed. On this contract was indorsed, in July, 1833, an agreement not under seal, by which, for a certain sum, the defendant agrees to keep all the machinery and tools in good order, excepting any accident to the fly-wheel of the rolling-mill. On the 11th of October, 1833, a further

agreement not under seal was indorsed, by which, in consideration and full satisfaction of previous breaches of the contract on the part of the plaintiffs, they make the defendant certain allowances, and for his benefit extend the term of the contract four months from the 1st of July, 1834, "all other parts to remain the same." On the 14th of October, 1833, a breach was made in one of the mill-dams by a very high tide, and the power of the south water-wheel was thereby reduced from a constant power to a tide power. At that time the defendant had on hand a large quantity of the plaintiffs' materials, in different stages of manufacture. The dam was repaired with due diligence, and the water power was restored on the 7th of March, 1834. At the time of the breach the plaintiffs had an unfinished steam-engine, which was completed and put in operation at their works on the 27th of December, 1833, and was equivalent in power to the south water-wheel. It was held, that the covenant to give the defendant the use of the south water-wheel, or an equivalent, was a stipulation for the use of mill-power, and not a demise to the defendant; that the furnishing mill power was a condition precedent to the performance of the defendant, because without it no essential part of the work could be done; that the plaintiffs had the election to furnish either the south water-wheel, or an equivalent power, not only at the commencement, but afterwards during the whole period contemplated for the performance of the contract, and that they might change from one to the other, from time to time, it being done without occasioning unnecessary inconvenience to the defendant; that, as they had such an election, so they were bound to furnish one or the other during the whole period,

subject to such occasional and casual interruptions as must necessarily attend the use of mill-power; that if the breaking of the dam was not a substantial suspension and destruction, for the time being, of the water power, for manufacturing purposes, but only a temporary diminution, subjecting the defendant to some lesser inconvenience, then it was not a breach of a condition precedent which would excuse the defendant from performance, although he might have a remedy by action of damages; that if the water power was destroyed for the time being, the defendant had no right to treat it as a breach of the condition precedent, and absolve himself from further performance, provided the dam could be restored, or an equivalent power be furnished from a steam-engine, within a reasonable time; that if the water power failed and could not be restored within a reasonable time, and an equivalent steam power could be furnished, and at a reasonable cost and expense, the plaintiffs were bound to furnish steam power; that, in such case, if such steam power was furnished within a reasonable time, the plaintiffs complied with the condition precedent, but otherwise there was a breach of the condition; that a breach of this condition precedent could only excuse the defendant from performing such part of the contract requiring the use of mill power, as remained to be performed when a breach of the condition happened; that although an interruption of the mill power might be construed to be the breach of a condition precedent, which would authorize the defendant to break off from the performance of his contract, yet if he continued in the performance until the power was reestablished, this would amount to a waiver, and he would no longer be excused from

further performance ; although, if he had suffered loss by the delay in furnishing the power, he would have a remedy by an action for damages ; that the furnishing stock and materials to some extent, and even to the whole amount, if that could be reasonably required, was a condition precedent to any obligation on the defendant to perform, because he was to work on the plaintiffs' materials ; but that if the plaintiffs had furnished a large quantity of materials, which the defendant had accepted and commenced working upon, he was bound to go on and finish the work on those materials : and a subsequent neglect or refusal, after a reasonable requisition, to furnish further materials, would not excuse him from performance so far as to finish what he had begun, though it would be a breach of contract for which he would have his remedy by action, and it would excuse his non-performance so far as occasioned by the want of the rest of the materials ; that a mere delay to furnish further materials, although it might prevent the defendant, in some particulars, from working to the best possible advantage, and subject him to some slight loss, which would be a ground for recovering damages, would not be a breach of condition, unless it were continued, after a reasonable requisition, for such a length of time as to warrant the jury in inferring that it was not the intention of the plaintiffs to furnish them ; and that the stipulation that the plaintiffs should advance money to pay the defendant's workmen, was not a condition precedent.

§ 275. In another important case, in Massachusetts,¹ the right to water power, and mode of its distribution

¹ *Bardwell v. Ames*, 22 Pick. (Mass.) R. 333.

and enjoyment, depended upon the terms of an indenture. The plaintiff, B., was originally the owner of a portion of the north shore of the Connecticut river, and of the bed of the river, to the thread of the stream, extending above and below the mills and mill privileges, hereafter mentioned. Water power had been created at this place, by erecting a pier near the shore, and running from it a wing-dam into the river, by means of which, a portion of the water was turned through guard-gates, placed between the pier and the shore, into a reservoir or pond, formed by the shore, and a side dam parallel thereto, and this pond supplied a stone flume, carried down along the shore. In 1826, by an indenture of three parts between the owners of the mills and water power, all the water power became vested in B., the party of the first part, and, by the same indenture, B. grants to C., the party of the second part, the right of drawing and using, for the benefit of his oil-mill, or such other mill works or machinery, as may be erected or used upon the site thereof, "from the pond and flumes, as now erected and in use, so much water as may pass through the following described gate-ways now used in said oil-mill, or others of equal capacity, (that is, such as will admit water of equal power,) viz : one gate-way of one foot and five inches in length, and eight and three fourths inches in height, with six feet and three inches head, (to wit, from the top of the flume to the bottom of the gateway;) another," &c., describing, in the same manner, three more gate-ways; and to the plaintiffs, H. & L., and others, the party of the third part, (which others, as also C., have since transferred their rights to H. & L.,) he grants "the right and privilege of drawing and using, for the benefit of a paper-mill, or such other mill works or machin-

ery as may be erected or used upon the site thereof, from the pond and flumes, as now erected and in use, so much water as may pass through" five gate-ways, (described in manner as above,) "now used in said paper-mill, or others of equal capacity;" and B. "reserves and retains to himself the right and privilege of drawing and using, for the benefit of his mill works and machinery, near said pond, or any other works which may be erected upon the same site, or near the same, from said pond and flumes, as now in use, so much water as may pass through" twelve gates, (described in manner as above,) three of them, "or an equivalent, to be drawn from the pond, without the stone flume," and nine of them "to be drawn from the stone flume;" and he also reserves and retains "the right and privilege of erecting and maintaining a sufficient flume, not exceeding eight feet in width of channel, to extend from the shore side of the lower end of the stone flume now built, down the river, for the accommodation of any works which may be entered below said paper-mill; provided, however, that the water to be drawn and used through said eight feet flume, shall not exceed in quantity, but may be equal to, that which the party of the third part are entitled to by this indenture. And it is mutually agreed, that the dam, pier, guard-gates, stone flume, and the general passage of the water into said flume, shall be and remain situated as they now are, forever, unless altered by mutual consent of all parties, and to be occupied in common, for the purpose of obtaining water, and making repairs, without hindrance or interruption from any party. And if there is at any time a deficiency of water, the parties shall respectively be entitled to draw the same, only in proportion to the rights and interests

above expressed ; and in case there is a surplus, they shall all be entitled to use the same ratio or proportion. And it is mutually agreed by the parties, that they and each of them, are to contribute towards the expenses of maintaining and repairing the dam, pier, guard-gates, and other works, for keeping up and supporting said pond, (exclusive of the stone flume,) in proportion to the water power which they respectively derive therefrom, the proportions to be determined by the capacities of the gate-ways, it being agreed that the party of the first part is not to contribute any thing towards said expenses, on account of his right or privilege of drawing and using water from said stone flume, below the said paper-mill, until he actually sells or makes use of the same, unless," &c. In 1831, B. conveys to the defendants a parcel of his land, bounded on the river, and going to the thread of the stream, (in which were situated the wing-dam, pier, guard-gates, side-dam, upper end of the stone flume, and the upper mill-site ; "also the right and privilege of drawing and using, for the benefit of a paper-mill, or such other mill works or machinery, as may be erected or used upon the above granted premises, so much water from the mill-pond, on said river, upon and above the premises, as is equal to the quantity and power to which " H. & L., &c., are entitled, by virtue of the indenture of 1826, " a part of such water, not exceeding one half, to be drawn from the stone flume, and the residue thereof from the pond above said flume. This grant of privilege of drawing and using water as above, is on condition that the defendants shall contribute towards the expense of maintaining and repairing the dam, pier, guard-gates, &c., in proportion, &c. And on condition that said dam, pier, guard-gates, stone flume, and the general passage for

water into said flume; shall be and remain situated as they now are, forever, unless altered by consent of all parties interested ;” “ making, however, from said sale and grants, the following reservations, to wit: I reserve to myself, &c., the right and privilege of drawing and using from said pond, over or across the granted premises, by means of said stone flume, the quantity of water or power, which I now draw for the use of my grist-mill, and clothier’s shop, and carding machine, and for my privilege below H. & L.’s paper-mill,” &c. The defendants erected a paper-mill on the mill-site granted to them, and built a penstock below the wing-dam, in order to increase the supply of water for their works, by which penstock the water was thrown back upon the wing-dam ; they also built a wall in the river south of their mill, which was extended down the river by the plaintiffs, and thereby a raceway was made, by which the water from the mills, instead of being immediately diffused in the river, passed into it at a place below all the mills. It was *held*, that the subject-matter of the indenture was the whole of the water power, created by the artificial works erected for the purpose of applying the stream to mill purposes, consisting of the wing-dam, pier, guard-gates, side-dam, and stone flume ; and that all the rights of the parties to the indenture, in all the water privilege, which was or could be derived by any mode of using these works, depended upon the indenture ; but that any rights which B. had, as riparian proprietor, in the unoccupied portion of the river, so far as they could exist and be used without impairing the conventional rights granted by the indenture, remained to him unaffected by the indenture. *Held* also, that the indenture effected a distribution of the entire water power, created by the artificial works,

not by a grant or reservation of a specific quantity of water power, as measured by the gate-ways, but by fixing the proportion in which all the parties should use the water power, whether it should exceed or fall short of the aggregate of all the powers particularly specified. *Held* also, the parties were not restricted by the indenture to the use of the gate-ways then existing, but that they might respectively change the places of their gates, by making new openings into the pond and stone flume, provided they did not weaken, or otherwise injure these common works, and that this would not be an alteration in these works, within the meaning of the indenture. *Held* also, that under the grant to the defendants, of the right of drawing so much water as is equal to the quantity and power to which H. & L., &c., are entitled, by virtue of the indenture, the measure of the water to be drawn by the defendants was the dimensions of the gate-ways and head of water, without regard to the greater or less fall from the gate-ways to the bottom of the raceway. *Held* also, that as against B., the defendants had a right to draw any part of the water granted to them, not exceeding one half, from the stone flume, and the residue from the pond; but that as, by the indenture, B. himself was allowed to draw from the pond only a certain quantity of water, (determined by the gates therein specified,) so as against H. & L., &c., the defendants could not draw more than that quantity from the pond. *Held* also, that if the defendants opened gate-ways in their mill, capable, in their ordinary action, of drawing a much larger quantity of water from the common reservoir, than the defendants were entitled to draw, especially if their gate-ways were withdrawn from observation, equity would award an injunction, compelling them

permanently to close a portion of their gate-ways, leaving such only as would enable them to draw the quantity to which they are entitled ; or, if the defendants' works were of such a character as to require the alternate action of particular gates, so that when one was open, a corresponding one would be closed, then, in order to obtain the right of making a greater capacity of gates, than it was intended to use at any one time, it would be incumbent on the defendants to set out such special case, and to give a pledge or security, adapted to the case, so as effectually to protect the rights of the other parties. *Held* also, that the defendants, as riparian proprietors, under the grant from B acquired a right in the stream, without and beyond the wing-dam, and other artificial works of the proprietors of the mills, and, as such riparian proprietors, might erect any works, and make any use of the stream, which could be done, without interfering with the common works of the proprietors of the mills, but that they had no right to alter those common works ; and that the erection of the penstock, higher than the wing-dam, so as to throw back the water upon that dam, was an alteration of the common works, and if it caused damage to the plaintiffs, they were entitled to relief. *Held* also, that the distribution by the indenture, of the mill-power, created by the common works, erected at the time, extended to the enjoyment of the raceway, then in use, for conducting the water from the mills, and that thenceforth, neither party could do any act to render this raceway less beneficial to the other parties ; that the defendants had a right to build the wall, on their own land, on the southerly side of the mill, to keep out the waste water of the river, provided it did not injure or impair the rights of the plaintiffs ; and the

plaintiffs had a right to continue this wall down the river, if it did not prejudice the defendants; and, (supposing the wall to be injurious to neither party,) that thenceforth the space between the wall and the shore became the common raceway of the parties, to be used in connection with their respective water-rights, as settled by the indenture. *Held* also, that if the plaintiffs, by their wall, narrowed the raceway, this would not justify the defendants in drawing from their penstock into their mill, and thence into the raceway, a quantity of water in addition to that which was or could be drawn from the common reservoir, and thereby impeding the plaintiff's wheels; not even if the defendants had, by their wall, kept from the plaintiff's wheels as large a quantity of back-water as the penstock was calculated to throw upon them. The plaintiff's bill in equity alleged, that the defendants were entitled to draw from the common reservoir 12,335 cubic feet per minute, but that they were erecting works which would require, and that they threatened to use, a much larger quantity; and it prayed for damages, and for an injunction, to restrain them from using more than 12,335 cubic feet per minute. The defendants' answer claimed a right to use more than 12,335 cubic feet per minute, but denied that they had used, or intended to use, more than they were entitled to; and it did not appear that they had drawn so much as 12,335 cubic feet per minute. It was *held*, that even if the defendants were not entitled to draw so much as that quantity, and had, in fact, drawn more than they were entitled to, yet, that under this issue, the plaintiffs could not recover damages against them, for having drawn too great a quantity, and that an injunction would not lie to restrain them from drawing 12,335 cubic feet per minute.

§ 276. In the construction of contracts and agreements, respecting water, the law has regard to the condition of the premises, at the time they were entered into. Where, in a deed from A to B, for part of a tract of land, described by courses and distances, after stating that whereas there issue out of Jones's Falls two races of watercourses, into another part of the tract, remaining unsold, which watercourses intersect a certain line, (one of the courses of the part of the tract conveyed to B,) it was covenanted by A, that B should have free use of said two races, or watercourses, as soon as they intersect said line, and that A would not change or divert the course of said two races from their present sources, through their present channel, but that the same shall flow freely and uninterruptedly, until they intersect said line, and that B should have free access to the sources of said races, to increase the streams of water, and that A should keep the said races proceeding from the south-westernmost part of the tract, in good order and repair, through that tract, until it intersects said line ; it was held to be the intention of the parties, that A should permit the water to flow through certain channels, over his land, for the benefit of B, and that, if the water flowed through such channels or races, at the date of the covenant, A was bound to keep them in such order and repair that the water should continue to flow through them as freely as at that time ; but, if the water did not, or could not flow through the channel of one of them, at the date of the covenant, A was not bound to deepen or widen such channel, so as to conduct the water to the land purchased by B.¹

¹ Carroll v. Cockey, 3 H. & Johns. (Md.) R. 282.

§ 277. Where a lease was executed of a mill-site, on a certain stream, for a term of years, and the lessor covenanted that he would not let or establish any other place on the same stream, to be used for sawing mahogany; it was held, that a subsequent demise, by the landlord, to third persons, of a mill-site on the same stream, without limitation or restriction, as to its use, and the establishment and use of a mill, by the lessees, under the second demise, in the sawing of mahogany, was a breach of the covenant. And also, that the covenant was broken, although the second demise was in strict conformity to a parol agreement, made and entered into by the defendant, *previous* to the first demise; it being considered by the Court, that a Court of Law cannot give relation back to a lease, to the time of a previous agreement, although followed by immediate possession.¹

§ 278. In *Davis v. Morgan*,² it appeared, that A, being seised of an ancient mill, together with a stream of water, diverted out of the river, and flowing from thence unto her mill; and B, being possessed of other mills, together with a stream of water, diverted out of the same river, above the stream of A, by means of a head weir, and flowing from thence through the lands of A, down to B's mills, as appurtenant to the same; B erected upon other lands, below the lands of A, and near the said watercourse, two other mills, whereby, it becoming necessary for him, (B,) to have a larger supply of water, he widened and deepened his watercourse in the soil of A, and raised and heightened the head weir, and thereby diverted the greatest part of

¹ *Norman v. Wells*, 17 Wend. (N. Y.) R. 136.

² *Davis v. Morgan*, 4 B. & Cress. R. 8.

the water into the watercourse, for the use of his mills, so that the water was prevented from flowing down to the mill of A, so copiously as it had formerly done, and thereby A's mill became of no use. A, having recovered damages in one action against B, on this account, and having afterwards brought a second action for subsequent damages, in order to prevent all further disputes, B agreed to take a grant from A, of the use and benefit of the watercourse, so widened and deepened, and of the liberty of diverting the water out of the river. By lease, reciting these facts, A, in consideration of £1,500, paid by B, demised to B the use of the watercourse so widened and deepened as aforesaid, and the free liberty of diverting so much of the water of the river into and along the watercourse, as should be necessary for the use of B's mills *habendum* for the term of ninety-nine years, if three persons, therein named, should so long live, at an annual rent. Soon after the execution of this deed, A's mill was destroyed. B, or those claiming under him, continued to enjoy the watercourse, and the use of the water, during the term, and paid the rent. The lease having determined, by the death of the last surviving *cestui que vie*, the person claiming under the grantee continued to enjoy the watercourse, in the manner described in the grant, and paid rent for it. The reversion in the lands, upon which A's mill formerly stood, having vested in C, it was held that the latter might maintain *indebitatus assumpsit*, for the use and occupation of the watercourse, and the water running therein, against the persons who claimed under B.

3. *Arbitrament and Award.*

§ 279. Questions respecting the use of the water of a watercourse, and the measure of water power granted, may, of course, by contract or agreement, be submitted to arbitrators. Arbitrators have authority to decide conclusively, all questions of law, necessary to the decision of the matters submitted to them, unless they are restricted by the terms of the submission, or unless it appears on the face of their award, that they intended to decide according to law, but have decided contrary to law. And there is no distinction, in this respect, between the authority of arbitrators, who are selected from the legal profession, and that of other arbitrators. The decision of arbitrators, to whom all questions of fact and law are submitted, and who act fairly, is conclusive, unless it can be impeached and avoided by proof of fraud, practised on them, or proof of mistake or accident, by which they were deceived and misled, so that their award is not in fact the result of their judgment. But their mistakes in drawing conclusions of fact, from evidence or observation, or in adopting erroneous rules of law, or theories of philosophy, are not a legal cause for avoiding their award. Hence, where a question as to the measure of a water power, granted by demise, was submitted to arbitrators, and they, after making numerous actual experiments, constructed a table, on hydraulic principles, by which the use of the water was to be calculated; it was *held*, that evidence was not admissible to show, that the table was constructed on erroneous principles.¹

§ 280. The owner of the water powers, at the Boston

¹ Boston Water Power Co. v. Gray, 6 Met. (Mass.) R. 131.

Mill-Dam, leased a certain number of mill powers, with an agreement that they would do nothing whereby the power granted might in any way be in anywise defeated or diminished. Disputes afterwards arose, respecting the quantities of water to which the lessee was entitled, and as to the mode of measuring and delivering the same, and the use thereof; whereupon the parties submitted the matters in dispute to arbitrators, authorizing them, (among other things,) to determine what quantities of water the lessee was entitled to draw, by virtue of his lease, and also to determine the manner in which the same should be measured and delivered, and to settle, in all other particulars, the legal rights of the parties, under and by virtue of the lease, and to employ such engineers, agents, &c., as they should see fit, for the purpose of enabling them to determine the extent of the water power, and other experimental matters, incident to the business committed to them, and to determine what part of the expenses appertaining thereto, shall be borne by each party. *Held*, that the arbitrators had not exceeded their authority, by awarding that the lessee should take the water at a lower level than that at which it was taken at the time when the lease was made; nor by awarding that the lessee should pay half the expense of an apparatus, which they ordered to be made and set up for measuring the water to be received by the lessee, and half the expense of the experiments made by the arbitrators, to determine the whole number of mill powers which the lessor owned; nor by awarding that the water, received by the lessee, should be measured after it had passed his mills, and not before. *Held also*, that the arbitrators had not exceeded their authority, by awarding that the lessors should remove accretions from the basin that received the water, whenever it should be neces-

sary to the full enjoyment of the water powers granted to the lessee, although the lessors might not own the soil; the arbitrators being of opinion that the lessors had the right, and were bound to enter upon the receiving basin, and remove therefrom obstructions arising from accretions. *Held further*, that the arbitrators, by awarding that the lessee was entitled to the use and enjoyment of his mill powers, "so long as the basins will furnish the same," had not, by implication, impaired his rights under the lease, which gave him such powers absolutely, and without any limitation."¹

§ 280 *a.* A and B made their submission to arbitrators, stating that, whereas they had a cause subsisting between them, relative to the right of turning water from a certain spring or rivulet, each one claiming the right to turn the water on to his own land, they submitted the same matter to the final decision of C and D, engaging to abide such decision, under a penalty. The arbitrators made an award, in which they decided what were the rights of the parties, respectively, in relation to the use of the water, and prescribed the mode in which those rights should be exercised. In an action of assumpsit, brought by A against B, for an alleged violation of A's right, it was held, 1, that the matter submitted was the right to the use of the water, and such right was correctly made the subject of the award; 2, that so much of the award as related to the future conduct of the parties, was unauthorized by the submission, and void; and 3, that no action would lie on such award, for an infringement of any right decided by it, although, in a proper action, it would be conclusive evidence of such right.²

¹ Boston Water Power Co. v. Gray, 6 Met. (Mass.) R. 131.

² Dutton v. Gillett, 5 Conn. R. 172.

§ 281. Where an action for polluting the water of a watercourse,¹ was referred to an arbitrator, with power to him to regulate the enjoyment of the water, it was held, that an award, directing a verdict to be entered for the plaintiff, and that the defendant should, at all times, take *all proper and reasonable precautions*, for preventing the water from being rendered unfit for the plaintiff's use, *and, in particular*, should use a process of filtering, mentioned in the award, was bad for uncertainty. The direction as to the particular process was, that the water, passing from the defendant's to the plaintiff's premises, should be passed through filtering lodges, made or to be made by the defendant, so as to be thereby purified and cleansed, for the plaintiff's use, "so far as the same can be purified and cleansed *by the ordinary and most approved process* of filtering, as aforesaid."² It was held, that the description, by reference only to the "ordinary and most approved process," was uncertain, and the award was bad in this respect also. "The award," said Lord DENMAN, C. J., "speaks of the 'most approved process.' By whose approbation is that to be determined? The witnesses who have made the affidavits, say that they understand the direction; but even they do not themselves state what, in their view, is the most approved method. It may be that the arbitrator risks the validity of his award, if he attempts to set out the process, and does it imperfectly; but much more is risked by the generality of description introduced here. The arbitrator must make himself scien-

¹ See Ante, § 136 - 141.

² *Stonehew v. Farrar*, 6 Adol. & Ell. (N. S.) R. 730. "Suppose," said Coleridge, J., "a question arose thirty years hence, on the fulfilment of the award; must the Court then go back to inquire what was the ordinary and most approved process thirty years before." Ibid.

tifically master of the subject; he is bound to understand it so fully, that he may make a statement on which no one can have a doubt; and that, when the material acts prescribed have been performed, it may be seen that the award is complied with, and parties may not be put to inquire for the greatest number of approvers. If dangers are to be considered, the most important is that which parties may incur upon awards, which do not finally settle their rights."

§ 282. An award between a lessee and a neighbor, awarding an act to be done for the benefit of the latter, by the lessee, which would be waste upon the estate of the lessor, is bad. In *Alder v. Savill*,¹ the parties agreed to refer upon terms, in pursuance of which, an order of *nisi prius* was afterwards drawn up, referring it to a gentleman of the bar, to settle all matters in difference, in that cause, between the parties, and to order and determine what he should think fit to be done by either of them, respecting the matters in dispute. And it was ordered, that the costs of that cause should abide the event of the award. Upon the view of the arbitrator and examination of numerous witnesses, it appeared, that the defendants were occupiers of a mill, upon the river Mole, and the plaintiff was the occupier of certain meadows, adjoining that part of the river, which was the defendant's mill-pond, and situate about a mile higher up the stream than the mills; certain ditches, coming down from lands more remote from the river than the plaintiff's farm, traversed these meadows, the level of which was below the water-level of the full mill-pond, and were intended to dis-

¹ *Alder v. Savill*, 5 Taunt. R. 454.

charge into the river the drainage of the country. At the mouths of these ditches, the former occupiers of the plaintiff's land had, about thirty years before the action, erected, and occasionally repaired certain penstocks or valves, which freely opened to the river, whenever the water on the land side was so high, that its pressing the valve outwards, overcame the contrary pressure of the water in the river, and thereby let out the water from the ditches into the bed of the river; and whenever the water in the river was higher than the water in the ditches, its pressure on the outside of the valves kept them closely shut against the upright posts to which they were applied, and prevented any water from the river from entering the ditches. These valves were at present disused and inefficient, from want of repairs. Some of the plaintiff's land, adjoining to the ditches, was injured by stagnating water. The defendants had purchased the residue of a term in the mills, which had been demised by the proprietor, to a tenant named Puplett, in whose time the machinery contained in the mills was of a very imperfect construction, and the water-wheels and waste hatches were much out of repair, and the water was very wastefully applied; so that when he wrought the mills, the level of the head of water in the mill-pond was in a very few hours drawn down much below the level of the meadows, and the water from the ditches was at such times freely discharged into the bed of the mill-pond, so that the plaintiff's lands, during that period, suffered very little from stagnating water. The defendants had, since the plaintiff had become occupier of his farm, rebuilt the mills on an improved principle, made the waste-water gates and mill-hatches tight and efficient, and applied the water economically to their

machinery, so that the head of water was rarely drawn down, and the same, or nearly the same level in the mill-pond, was consequently continued for a much longer time together, than it used to be during Puplett's occupation; and by reason of such alteration, in the mode of management, the water in the ditches accumulated and stagnated for a much longer time than before, on the plaintiff's land, which certainly was thereby deteriorated; but it was clearly proved that the defendant's improved mill, and waste-water gates, the ground-sills of which had remained unaltered, did not confine the water in the mill-pond to so high a level, as the mill and gates which existed in Puplett's time used to confine it; and the arbitrator declared himself satisfied of that fact. No evidence was given of the state of the defendants' mill, at any period anterior to Puplett's term. The attorneys, both for the plaintiff and defendants, had applied to the associate, for orders of reference, and the defendant's attorney, who applied last, obtained an order, drawn up in pursuance of his own conception of the terms of the reference, and empowering the arbitrator to order what he should think fit to be done by either of the parties, as well respecting the matters in difference in that cause, as also all matters in dispute between the parties; and ordering that the costs of the cause should abide the event of the award, in respect of the matters in difference in the cause. The plaintiff's order of reference was that which was left with the arbitrator, for his guidance, the defendants not being aware of the diversity in the terms. The arbitrator, reciting that disputes subsisted between the plaintiff and defendants, concerning damage, alleged by the plaintiff to have been done and occasioned to his meadows, by the penning back of

the water of the river, by the flood-gates and machinery of the mill, and that an action had been brought to recover damages for such injury so alleged to have been done to the plaintiff's meadows, by the means above stated in the declaration, awarded that the defendants should, within four months, make and complete, in a workmanlike manner, an overfall, or tumbling bay, for the discharge of the water of the river, at a convenient place between the plaintiff's meadows, and the waste-gate of the mill, of specified dimensions, and that the defendants should, at their own cost, maintain such tumbling bay, at that height and width, during their possession of the mill, and pay the plaintiff £150, whereupon the parties should execute mutual releases, up to the date of the submission. Mr. J. HEATH, in giving judgment, said: "With respect to the tumbling bay, if the defendants had been seised in fee, the award would have been good, but the power given to the arbitrator to determine what he should think fit to be done, must be confined to reasonable acts; and the making a tumbling bay on the lessor's land, would be waste in the defendants; we cannot permit them to be attached on the one side, for doing that, upon which they would, on the other hand, be sued for waste. The Court cannot try the merits of the case; but as to the damages, it is to be intended that they are given for the injuries alleged in the declaration, unless the contrary appears, and damages could not be given, unless it were for penning the water too high. The keeping it penned up for a longer time than usual, would not entitle the plaintiff to recover a single farthing, if it were not penned up higher than usual. It is fit that a reference should be made to the associate, to ascertain

whether of the two rules of reference is drawn up conformably to his minutes of the agreement made at the trial, and if the associate reports in favor of the defendant's rule, let a reference be made to the arbitrator, requesting him to state upon what ground he gave the damages. In this term the associate reported, that, according to his minutes, the plaintiff's order of *missi prius* was the prior and the correct order; whereupon the Court made the plaintiff's rule absolute for setting aside the defendant's rule of Court, confirming their order of reference, but without costs, on account of the manifest injustice of making the costs of the action abide the event of matters, which could not be, and were not decided in the action. *The Court* made the defendants' rule absolute, for setting aside so much of the award as related to the erecting a tumbling bay, but discharged the rule as to the residue."

§ 283. Still an award must be performed by the parties, as far as they lawfully can; and if several matters be directed to be done, all within the arbitrator's power to order, it is no answer to an attachment for non-performance of the award, that, as to one of the matters, it is out of the party's power to do it, or that compliance would subject him to an action, if he have done nothing to show his willingness to obey the award. Hence, where an umpire directed a defendant to prostrate some *weirs*, of which he was proprietor, and also another *weir*, in which he had only a share, and then said he made his award only to extend so far as any right or interest the defendant possessed; it was held by the Court, that it was the defendant's duty to obey, as far he could, and that, if he could not remove his share of the latter *weir*, without being liable to an action

of trespass, that would be an answer to that part of the award.¹

§ 284. An award by commissioners, under an "inclosure act," directed that the owners of lands over which a certain drain passed, should cleanse and keep the same of a sufficient width and depth to carry off the water, "intended to run down the same." The occupier of a close by which the drain passed, and whose lands were drained by it, subsequently, for the better draining of his lands, opened a sough or under drain into the awarded drain. It was held, that this mode of draining, not being contemplated by the award, the owner of land lower down, across which the drain ran, was not bound to keep the awarded drain of sufficient capacity to carry off the additional water which was poured into it by the sough.²

¹ *Doddington v. Hudson*, 1 Bing. R. 410.

² *Sharpe v. Hancock*, 7 Man. & G. R. 354.

CHAPTER VIII.

OF THE RIGHT TO THE USE OF THE WATER, AS DEPENDING
UPON PAROL AND VERBAL LICENSE.

1. Difference between an Easement and a Right by License.
2. The Extent of the Right derived from Parol Licenses, in general.
3. The Extent of the Right derived from Parol Licenses executed, and expense incurred, &c., as conveying an Interest in Land.
4. The Equitable Doctrine concerning Parol Licenses.
5. Doctrine of Estoppel, as applicable to.

1. *Difference between an Easement and a Right by License.*

§ 285. AN *easement*, it has appeared, is a liberty, privilege, or advantage in land, without profit, and existing distinct from the ownership of the soil;¹ and it has appeared also, that a claim for an easement must be founded upon a deed or writing,² or upon prescription which supposes one.³ It is a paramount interest in another's land, with a right to enjoy it fully and without obstruction. A *license*, on the other hand, is a bare authority to do a certain act or series of acts, upon another's land, without possessing any estate therein; and, it being founded in personal confidence, it is not assignable, and it is gone if the owner of the land who

¹ Ante, § 142.

² Ante, 168 – 173.

³ Ante, Ch. VI.

gives the license transfers his title to another, or if either party die.¹ Yet, notwithstanding the positive authorities which have been referred to in a former chapter,² questions of considerable difficulty and nicety have arisen, both in England³ and in America,⁴ as to the *effect of a license*; and it has been contended, that “a beneficial interest in land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing;”⁵ and in fact, the distinction between a privilege or easement carrying an interest in land, and requiring a writing within the statute just mentioned to support it, and a license which may be by parol, “is,” it has been considered, “quite subtle; and it becomes difficult, in some cases, to discern a substantial difference between them.”⁶ It is certain, however,

¹ 3 Kent, Comm. 452; *Miller v. Auburn and Syracuse Railroad Co.*
⁶ Hill, (N. Y.) R. 61.

² Chap. V. § 168 – 178.

³ Gale & What. on Easem. 13.

⁴ 3 Kent, Comm. 452.

⁵ 7 Taunt. R. 384.

⁶ 3 Kent, Comm. 345. For the nature of licenses, and for the legal nature of a license, we give the following from the elaborate judgment of C. J. Vaughan, in *Thomas v. Sorrell*, (Vaughan, R. 351,) and in *Wood v. Leadbitter*, (13 M. & Welsb. R. 843.) In the course of his judgment, the latter learned Judge says, — “A dispensation or license, properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which, without it, had been unlawful. As a license to go beyond the seas, to hunt in a man’s park, to come into his house, are only actions, which, without license, had been unlawful. But a license to hunt in a man’s park, and carry away deer killed, to his own use; to cut down a tree in a man’s ground, and to carry it away the next day after, to his own use, are licenses as to the acts of hunting and cutting down the tree; but as to the carrying away the deer killed, and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney, to warm him by, as to the actions of eating, firing my wood, and warming them, they are licenses; but it is consequent necessarily to those actions, that my property may be destroyed, in the meat eaten, and in the

that a license, otherwise inconsistent with the Statute of Frauds, may convey as extensive an interest as that statute provides for, whenever it is so contemplated by an act of the legislature. By the act of the State of New York, concerning the regulation of highways,¹ it is declared, that it shall not be lawful to lay out any road through improved land without the *consent* of the owner. The Court, in *Noyes v. Chapin*,² held, that, by this statute, the public may acquire an interest in lands or an easement, without a writing, and that such was not inconsistent with the Statute of Frauds, inasmuch as it was by act and operation of law.

2. *The Extent of the Right derived from Parol Licenses in General.*

§ 286. The right to a privilege annexed to, or growing out of lands, and the exercise or enjoyment of which is inseparable from the land, when conveyed by an instrument duly signed and sealed, cannot be recalled or revoked, even before it is carried into execution by the grantee; whereas, a license unexecuted to enter and enjoy the privilege, (unless created as above

wood burnt. So as in some cases, by consequent, and not directly, and as its effect, a dispensation or license may destroy and alter my property." Now, as Mr. Baron Alderson says, (in giving judgment in *Wood v. Lead-bitter*, *ub. sup.*,) "alluding to this passage, in conjunction to the title 'License,' in Brooke's Abridgment, from which, and particularly from paragraph 15, it appears that a license is in its nature revocable; we have before us the whole principle of the law on the subject. A mere license is revocable; but that which is called a license, is often something more than a license; it often comprises, or is connected with, a grant, and then the party who has given it, cannot, in general, revoke it, so as to defeat his grant, to which it was incident."

¹ 16 sect. See Rev. Laws, New York, 275.

² *Chapin v. Noyes*, 6 Wend. (N. Y.) R. 461.

mentioned by law,) is countermandable and revocable at any time, just as it may be agreeable or not to the licenser.¹ A license, said Lord Ellenborough, is not a grant, but may be recalled immediately;² for although it may be a contract (parol) for "an interest in or concerning land, yet it is but collateral, and no additional interest in the land (as in the case of an easement) is conveyed by such contract; the interest of the land-owner being the same as before."³ But that a limited or partial right to enjoy a privilege connected with the soil, may be acquired by parol license, is shown in many cases.⁴ Where, for example, a person contracted with the owner of a close for the purpose of a growing crop of grass, for the purpose of being mowed and made into hay by the vendee; it was held, that the vendee had such an exclusive possession of the close, that he might maintain trespass against him who entered and took the grass, even with the consent and license of the land-owner. The Statute of Frauds, it was considered, did not expressly and immediately vacate such contracts, but that it only precluded the bringing of actions to enforce them by charging the contracting party on the ground of such contract, and of some supposed breach thereof.⁵

¹ *Fentinam v. Smith*, 4 East, R. 107; and Ante, § 169.

² *Rex v. Inhabitants of Horndon on the Hill*, 4 M. & Sel. R. 565.

³ *Donellan v. Read*, 3 Adol. & Ell. R. 899.

⁴ See 2 Hilliard, Abr. Am. Law of Real Property, 52, *et seq.*

⁵ *Crosby v. Wadsworth*, 6 East, R. 602. An outgoing tenant, after the determination of his lease, has the right to enter upon the land, but this, it was held, is not sufficient for him to maintain trespass against a succeeding tenant, who enters to seed the land before the crop comes to maturity. *Dorsey v. Eagle*, 7 G. & Johns. (Md.) R. 321. The defendant, in June, agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, the plaintiff to have them in October, and

§ 287. Nevertheless, it is a well-established general principle, that an unexecuted parol grant of any interest concerning land is revocable at the pleasure of the licensor. A general permission to enter upon land and take timber, is revocable;¹ and so a parol license to abut a dam upon the land of another, has been held subject to be revoked at any time before the expenditure of money.² Where the defendant gave permission to the plaintiff to pass over his land with teams, and there being no consideration for the license, it was held, that it might be revoked at pleasure.³ Where a drain and tunnel from a spring were dug, with the verbal consent of the then tenant, and had been used for fifteen years, such license was adjudged to be revocable.⁴ A parol license was given by A to B, to dig up the soil and make embankments and a railway over it, it was held to be countermandable at any time, whilst it remains executory; and that if A conveyed the land to another, the license was determined at once, and without notice to B of the *transfer*; and that if B afterwards enters upon the land, he is liable in trespass.⁵ Where an ancestor consented by parol to have his land overflowed, by the erection of a dam, the

to find diggers. It was held, that this was not a contract for the sale of an interest in land, within the statute of frauds. *Sainsbury v. Matthews*, 4 M. & Welsb. R. 348. An oral agreement, for the sale of mulberry trees in a nursery, and raised to be transplanted, and a license to enter upon the land and remove the trees, is valid, though not in writing. *Whitmarsh v. Walker*, 1 Met. (Mass.) R. 818.

¹ *Baker v. Wheeler*, 8 Wend. (N. Y.) R. 505.

² *Beidelman v. Foulke*, 5 Watts, (Penn.) R. 806.

³ *Dexter v. Haven*, 10 Johns. (N. Y.) R. 426.

⁴ *Cocker v. Cowper*, 1 Cr. M. & R. Exchr. R. 418; and see *Hewitt v. Shippam*, 5 B. & Cress. R. 221.

⁵ *Wallis v. Harrison*, 4 M. & Welsb. R. 588.

Supreme Court of North Carolina held, that the license ceased with the *death* of the ancestor, and the heir could recover damages.¹ "There is nothing," says Mr. J. COWEN, "to prevent the license operating according to its own nature, and there is no book which teaches that, before a license is revoked, or has expired, though it be not executed, a man is liable to pay damages for availing himself of it. It is personal to himself, and if it regard land, it is gone, if the person who gave the license transfers his title to another; and so, doubtless, by the death of either party."²

§ 288. A parol license is clearly a justification, until recalled by the licensor, or revoked by a transfer, or by death, as above mentioned, as the utmost effect which is ever given to proof of it, is to afford a defence to an action of trespass. It inures as a personal authority, and until revoked, protects the defendant against an action for a wrong. Indeed, there cannot, in the nature of things, be any legal wrong until the license is countermanded, unless it can be said, that a man may do an actionable wrong to himself touching his own property.³ The subject is treated in this point of view, by Mr. C. J. PARKER, in *Cook v. Stearns*,⁴ and in a most satisfactory manner. "Licenses to do a particular act," says he, "do not, in any degree, trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall

¹ *Bridges v. Purcell*, 1 Dev. & Bat. (N. C.) R. 492.

² *Miller v. Auburn and Syracuse Railroad Co.* 6 Hill, (N. Y.) R. 64; and see also *Munford v. Whitney*, 8 Wend. (N. Y.) R. 380.

³ *Ibid.*; *Abbott v. Wood*, 1 Greenl. (Me.) R. 115; *Davis v. Thompson*, 1 Shep. (Me.) R. 209; *Folsom v. Moore*, 1 App. (Me.) R. 252.

⁴ *Cook v. Stearns*, 11 Mass. R. 538.

be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be trespass."¹

§ 289. In *Chapman v. Hartshorne*, in Connecticut,² the defendant was employed as superintendent of a manufactory, but before the time had expired he was dismissed by notice in writing. He still persisted in entering upon the premises, and endeavored to induce the workmen to obey him, and not the plaintiff. DAGGERT, J., charged the jury, that the defendant was justified in doing so; for his contract gave him the right to enter and occupy, as superintendent, till the contract had expired, saying, when the plaintiff "bound himself by contract to pay the defendant for superintending his manufacturing establishment, he has given to him full authority to enter and occupy during the continuance of the contract." The jury found a verdict for the defendant, but the Court granted a new trial, on the ground that the defendant had no right to enter after he was dismissed; for the master has at all times a right to dismiss his servant, making himself responsible for the consequences when he dismisses without cause. But where a grantee, at the time of the execution of the deed, agreed that the grantor might

¹ It is held in Massachusetts, that if owners of land adjoining have a dispute about the line of partition, and agree that certain persons shall survey and establish the line, and that their doings shall be decisive, and they survey and mark the line accordingly; this does not give to one of the owners such a right to the land on his side of the line so marked, as to preclude the other from showing that his land extends beyond such line. The effect of the paper as a license, would be to *protect the plaintiff against any action*, by the defendant, for any act done upon the land, which would otherwise be a trespass. *Whitney v. Holmes*, 15 Mass. R. 152; *Pond v. Pond*, 14 Ibid. 402.

² *Chapman v. Hartshorne*, 9 Conn. R. 564.

enter upon the premises, to remove certain property belonging to him; it was held, that the former could not maintain trespass for entering in pursuance of such license. The act was done by the consent of the person who claimed to be injured thereby, and who cannot be considered as injured; — *Volenti non fit injuria*.¹

§ 290. In *Wood v. Manley*, in the Queen's Bench,² it appeared that goods, which were upon the plaintiff's land, were sold to the defendant; and that, by the conditions of the sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods. It was held, that, after the sale, the plaintiff could not countermand the license. And the defendant having entered to take, and the plaintiff having brought trespass, and the defendant having pleaded leave and license, and a peaceable entry to take, to which the plaintiff replied *de injuria*; it was held, that the defendant was entitled to the verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the gates, and forbidden the defendant to enter; and the defendant had broken down the gates, and entered to take the goods. "The plaintiff," as was said by WILLIAMS, J., "having assented to the terms of the contract, put himself into a situation from which he could not withdraw."

§ 291. In a case in the Court of Appeals, of Maryland, in which the action was for damage in diverting a watercourse from its natural channel, on the plaintiff's land, it was held, that the defendant might show

¹ *Parsons v. Camp*, 11 Conn. R. 525.

² *Wood v. Manley*, 11 Adol. & Ell. R. 84.

that the diversion was made on his land in virtue of a verbal agreement between him and the plaintiff that he might make the diversion, for the purpose of working a mill to be erected by him (the defendant) on his land, if the defendant would allow the plaintiff the use of the road through the defendant's land, and the execution of such agreement; or, that the plaintiff entered into such contract with the defendant, conferring the privilege with a fraudulent design and for the purpose of extorting money from him. Such evidence, it was held, was admissible in mitigation of damages, and for the purpose of showing that the defendant was not a trespasser *ab initio*, for continuing the diversion after a countermand of his authority by the plaintiff.¹

§ 292. The case of *Miller v. Auburn and Syracuse Railroad Company*, in New York,² is a case of justification of acts done under a license, while unrevoked. The action was against the company, for building and constructing their road on a street in front of the plaintiff's house, so as to obstruct his right of egress and ingress; and it was held, that the company might give evidence of a parol license from the plaintiff to build the road, and thus defeat his claim for all damages sustained while the license remained unrevoked. "If," (said Mr. J. COWEN, who delivered the judgment of the Court,) "what the defendants in this case proposed to show was true, viz.: that the plaintiff verbally authorized the making of the railway, while the authority remained, their acts were no more a wrong to the plaintiff, than if he had done them himself."

¹ *Addison v. Hack*, 2 Gill, (Md.) R. 221.

² *Miller v. Auburn and Syracuse Railroad Co.*, 6 Hill, (N. Y.) R. 61.

§ 293. The construction is that a license to enter upon land, *does not purport* to convey an interest in land; it is substantially a promise without any consideration to support it; and while it remains executory, may be revoked at pleasure. When *executed*, however, it can only, in general, be revoked, by placing the other party in the same situation in which he stood before he entered on its execution.¹ Where one party authorized another to divert a watercourse running through the lands of both, by means of a license, countermandable in its nature, and the authority was exercised as granted, it was held, that the party who had the power to countermand could only be restored to his rights by doing justice to the other, and tendering him the expense he has incurred under the license.²

§ 294. Where the defendant, in an action for the obstruction of a watercourse, by raising his dam, proved, that the person under whom the plaintiff claimed was frequently present during the erection of the dam, and did not object to or forbid its erection, and even expressed an opinion that it would be beneficial to his mill; and the plaintiff had said, that he was satisfied with the manner in which the defendant had used the water; it was held, that these facts did not amount to a license to erect the dam, but were at most only evidence of such license; and that consequently it was

¹ Per Cowen, J., in giving the judgment of the Court, in *Mumford v. Whitney*, 15 Wend. (N. Y.) R. 380. And see *Case v. Weber*, 2 Carter, (Ind.) R. 108; *Sutcliffe v. Wood*, Jur. 75, and S. C. 8 Eng. Law & Eq. R. 217.

² *Addison v. Hack*, 2 Gill, (Md.) R. 221. And see *Winter v. Brockwell*, 8 East, R. 308; and Post, Part 4, of the present Chapter, "*The Equitable Doctrine Concerning Parol Licenses.*"

proper for the Court, upon such evidence, to leave it to the jury to say whether such license was in fact given.¹

3. *Extent of the Right derived from Parol Licenses executed, and as Conveying an Interest in Land.*

§ 295. There has been occasion, in a former chapter, to introduce authorities to show, that at Common Law, and by the Statute of Frauds, easements and all incorporeal hereditaments can only be created and transferred by *deed, devise, or record*.² The several provisions of the well-known statute referred to, has been asserted by a very learned and eminent Judge, (Lord C. J. KENYON,) to be one of the wisest laws in the English statute book;³ and according to the views of Mr. Baron PARKE, there cannot be, by force of this statute, an irrevocable license to enter upon land without its amounting to an interest in lands, and which, therefore, by the force of the Statute of Frauds, can pass only by deed.⁴ Mr. J. LITTLEDALE inquired, "Suppose he" (one of the parties in the action) "had given a parol license to a neighbor to put cattle on his premises, and that person had in consequence made pens and roads, could not the license be countermandable?" To which the counsel replied, that in such case the license was subject to technical difficulties, and that if it conveyed an interest in the land, it must be granted by lease, written, and signed, or be held

¹ Johnson v. Lewis, 13 Conn. R., per Sherman, J.

² Ante, 168 - 173.

³ Chaplin v. Rogers, 1 East, R. 194.

⁴ Williams v. Morris, 8 M. & Welsb. R. 488.

merely *at will*; and if it amount to an easement, it can pass only by deed.¹ Where a rector granted to A, by parol leave, to make a vault in the parish church, for the burial of the remains of a certain person there, and also the exclusive use of the vault; and afterwards, without the leave of A, opened the vault and buried the remains of another person there, it was held, that no action could be maintained against him for so doing; for that the rector could not grant the exclusive use by parol: BAYLEY, J., said, "If it be not an interest in land, it is an easement, or the grant of an incorporeal hereditament, which could only be effectually granted by deed, and no such instrument was executed."² A demise in writing, but not under seal, of a messuage, with full, free, and exclusive license for the lessee to hunt, shoot, and sport in, over, and upon the manor of the lessor, and to fish in the waters thereof, at an entire rent, was held to be altogether void.³ In a very elaborate judgment given by Mr. J. BAYLEY, the necessity of a deed for creating any incor-

¹ *Bridges v. Blanchard*, 1 Adol. & Ell. R. 536. "A license," says Lord Ellenborough, "is not a grant, but may be recalled immediately, and so might this license, the day after it was granted." The license, in this case, was from the lord of the manor, to build a cottage on the waste; the license had been executed, and the cottage inhabited by the licensee. *Rex v. Horndon*, 4 M. & Sel. R. 565. In *Doty v. Gorham*, the Supreme Court of Massachusetts determined, that where a building is placed on land of the plaintiff, with his permission, and the building was sold on an execution against the owner of it, the purchaser had a right to enter upon the land and remove the building. The debtor having placed the building upon the plaintiff's soil, by his permission, was *tenant at will* of the land on which it stood. *Doty v. Gorham*, 5 Pick. (Mass.) R. 487.

² *Bryon v. Whistler*, 8 B. & Cress. R. 288.

³ *Bird v. Higginson*, 4 Nev. & Man. R. 505; and see also *Somerset (Duke of) v. Fogwell*, 5 B. & Cress. R. 875.

poreal hereditament affecting land was expressly recognized, and formed the ground of decision.¹

§ 296. Notwithstanding the authorities adduced in the preceding section, establishing the doctrine, that easements and other incorporeal hereditaments, can in England pass only by deed, there have been cases in that country to the contrary. But, as has been forcibly observed, "to give absolute effect to a parol license, and hold that it passes a *perpetual* right, or an absolute right, even for years, in, upon, and over the grantor's land, so as thereby to part with or prejudice any part of his interest therein, would be in the teeth of the statute against frauds."² We do not refer to the case of *Winter v. Brockwell*,³ which has been so very much discussed both by the bench and at the bar, in America as well as in England, as it is ranked among cases of another category, and, as we shall by and by show, is inapplicable to the subject immediately before us. It is one of that class of cases which we have already had occasion to bestow considerable attention, and which shows that a parol license carried into execution may work the *extinguishment* of an easement. The doctrine with regard to the nature and effect of a parol license, in *creating* an easement, had derived very considerable illustration from the case of *Wood v. Leadbitter*,⁴ to which we propose to have recourse, for the purpose of

¹ *Hewlins v. Shippam*, 5 B. & Cress. R. 222, and cited Ante, § 169, and see also *Fentinam v. Smith*, 4 East, R. 109, and cited Ante, § 169, and other cases cited from § 168 to § 173.

² Sugden on Vend. and Pur. (8th Eng. edit.) 74, 75; and see 1 Chitty, Gen. Pract. 836 - 839.

³ *Winter v. Brockwell*, 8 East, R. 808.

⁴ *Wood v. Leadbitter*, 13 M. & Welsb. R. 837; and 34 Lond. Law Mag. p. 129.

removing the doubt and uncertainty which have been occasioned by some of the earlier cases.

§ 297. Four cases have been relied on in England in support of the doctrine, that there are some parol licenses which are irrevocable. The first is *Webb v. Paternoster*.¹ This case, as appears from the report in Rolle, was an action of trespass brought against the defendant for eating, by the mouths of his cattle, the plaintiff's hay. The defendant justified under Sir William Plummer, the owner of the fee of the close in which the hay was, averring that Sir William Plummer leased the close to him, and therefore, as lessee, he turned his cattle into the close, and they ate the hay. The plaintiff replied, that, before the making of the lease, Sir William Plummer had licensed him to place the hay on the close, till he could conveniently sell it, and that before he could conveniently sell it, Sir William Plummer leased the land to the defendant. The defendant demurred to the replication. From the arguments, as given in Rolle, it appears that the plaintiff's counsel, who was first heard, contended, first, that the license, being a license for profit, and not merely for pleasure, and being also for a certain time only, namely, till he could sell his hay, was not revocable; and secondly, even if the license was revocable, still that the lease to the defendant was an implied, and not an *express* revocation, and therefore was inoperative against him without notice; and for this he referred to Mallory's case, 5 Rep. 111. To this latter proposition, the Court appears to have assented; but DODDERIDGE, J., suggested, that, even if the license was in force, still

¹ *Webb v. Paternoster*, reported in five different books, viz.: Palmer 71; Rolle, 143, and 152; Noy, 98; Popham, 151; and Godbolt, 282.

the licenser did not, by such a license, preclude himself, nor consequently his tenant, from turning cattle on the land, and that the *licensee* ought to have taken care to protect the hay from the cattle. As to this, however, the Chief Justice expressed a doubt. The defendant's counsel was heard some days afterwards, and he alleged, that it appeared by the record, that the plaintiff had had two years to sell his hay, before the defendant's cattle had eaten it; and he argued that the Court would say, as matter of law, that this was more than reasonable time; and to this the Court assented. The plaintiff's counsel, in reply, reverted to the distinction between the license for profit, and a license for pleasure; but DODDERIDGE denied it, and said that a license to dig gravel, though a license for profit, is revocable; and he said that the true distinction was between a *mere* license, and a license *coupled with an interest*. Judgment was eventually given for the defendant, on the ground that the plaintiff had had more than reasonable time to sell the hay. It will be seen, therefore, that the only two points decided were, first, that the question of reasonable time was for the Court, and not for the jury; and, secondly, that two years was more than a reasonable time. The decision, therefore, itself, has no bearing on the point for which it has been cited; and the only support which the case affords to the doctrine which has been so very often contended for, is what is said in the report of the case in Popham, to have been agreed by the Court, namely, that a license for profit for a term certain is not revocable; a proposition to which, with the qualification we have already pointed out, we entirely accede. It is, moreover, by no means certain, that the license in *Webb v. Paternoster* was not a license under seal. The defend-

ant's counsel appears, from the report in Rolle, to speak of the plaintiff as *grantee* of the liberty to stack hay, &c.; a form of expression not very appropriate, if used in respect of a party who had a mere parol license; and the Chief Justice, according to the report in Popham and Palmer, says that the plaintiff had an interest which charged the land, into whose hands soever it come. And DODDERIDGE, J., according to the report in Palmer, arguing that the lessee certainly might turn his cattle into his own field, and was not bound to stop their mouths, says it was folly for the plaintiff, that he did not, *together with the license, take a covenant that it should be lawful for him to fence the hay with a hedge.* From these expressions, (and there are others in the various reports of the case having a similar aspect,) it certainly seems possible that the license was under seal; and then the only point would be that which alone was in fact decided, namely, whether, supposing the plaintiff to have acquired by grant a right to stack his hay on the land for a limited time, that limited time had expired. Even supposing the license to have been a mere parol license, yet the strong probability is, that Webb had purchased the hay from Sir William Plummer, as a growing crop, with liberty to stack it on the land, and then the parol license might be good, as a license coupled with an interest. Be this, however, as it may, the decision, as we have already pointed out, has very little, or rather no bearing on the point before us; and the judgment of DODDERIDGE, J., as given both in Rolle and Palmer, is in strict accordance with what was afterwards laid down by VAUGHAN, C. J., and which may be considered to be consonant both to principle and authority.¹

¹ Judgment of Baron Alderson, in *Wood v. Leadbitter*, 13 M. & Welsh. B. 836. For the judgment of C. J. Vaughan, see Ante, note 6 to § 285.

§ 298. The next decision in England, in order of time, is one which has been much commented on, viz: that of *Wood v. Lake*.¹ It appeared in this case, that a parol agreement was entered into for liberty to *stack coals* on a part of a close for *seven years*, and that during the term, the person to whom it was granted should have the sole use of that part of the close, upon which he was to have liberty of stacking coals. It was held, that this agreement was valid, LEE, C. J., and DENNISON, J., relying on the above case of *Webb v. Paternoster*. The decision in this case of *Wood v. Lake* has been forcibly attacked by Sir Edward Sugden, as a relaxation of the Statute of Frauds, which holds out a strong temptation to a man in possession of land, under a parol agreement, to commit perjury, in order to ensure to himself a more permanent interest in the land than the statute would permit him to claim, were the real transaction disclosed. That statute, he says, "expresses an anxious intention to embrace *interests* of every description," and "how," says he, "can it be argued, that a license, not countermandable, and which confers the sole use of a place on a man, is not an interest within the statute?"² No report of this case is given of the arguments at the bar.³ "Supposing,"

¹ Sayer, R. 3.

² Sugden, Vend. & Pur. (6 Amer. edit.) 100.

³ But from a MS. report, which the Court, in *Wood v. Leadbitter*, (*ub. sup.*) had the opportunity of consulting, through the kindness of the representatives of the late Mr. J. Burrough, it appears that the argument turned wholly on the point, whether the privilege of stacking the coals did or did not amount to a lease; for if it did, then the defendant contended it was void after three years, under the Statute of Frauds. The following is the MS. copy of the report of Mr. J. Burrough:

"CASE — A parol agreement, that the plaintiff should have liberty of laying and stacking of coals upon defendant's close, for *seven years*.

says Baron ALDERSON, in commenting upon this case, "the Court to have been right in deciding that this was not a lease, (which, however, is doubted by Sir E.

Afterwards, defendant forbids plaintiff to lay any more coals there, and shuts up his gates. Defendant says, that plaintiff was but tenant at will. *Quære*, if this was an interest within the description of the Statute of Frauds.

Sergeant *Booth*. — This is but a personal license or easement. 1 Roll. Abr. 859, p. 4; Roll. Rep. 143, 152; 1 Saund. 321. A contract for sale of timber growing upon the land, has been determined to be out of the statute. 1 Ld. Raym. 182. Vide the difference of a license and a lease. 1 Lev. 194. This must be taken only as a license, for that the coal-loader also is to have benefit as well as plaintiff.

Sergeant *Poole*, for defendant. — Question is, if any interest in land passed by the agreement; for, if interest passed, it is within the statute, ergo void, being for longer term than three years. Bro. License, p. 19; *Thome v. Seabright*, Salk. 24; *Webb v. Paternoster*, Poph. 151. A license to enter upon and occupy land, amounts to a lease. The plaintiff is not confined to a particular part of the close, and might have covered the whole, if he pleased; on that account it is an uncertain interest. The distinction of license to plaintiff, and his coal-loader, is nothing; he could not stack the coal himself, and is merely vague. Easement may be of more value than the inheritance; ex. gr. way-leave.

Lee, C. J. — If this be a lease, as it is argued, it is within the statute, and void for not being in writing. No answer as yet is given in the case in *Popham*, when the stacking of hay, which is similar, was determined to be a license. The word *uncertain*, in the statute, means uncertainty of duration, not of quantity. License was not revocable, and here is no case to show this to be considered as a lease.

Dennison, J. — This seems not to be an interest, so called, in the language of the law, although easements, in general speaking, may be called interests. Had the plaintiff such an interest as to have maintained a *clausum fregit*? Certainly not. If a man licenses to enjoy lands for five years, there is a lease, because the whole interest passes, but this was only a license for a particular purpose.

Foster, J. — These interests, grounded upon licenses, are valuable, and deserve the protection of the law, and therefore may perhaps have been within the intention of the words of the statute. — Desired further time for consideration: stood over.

N. B. — Afterwards, upon motion for judgment the last day of the term, and gave judgment for plaintiff. *Foster non dissentiente*."

Sugden,)¹ yet no grounds are stated on which it could be held good as an easement originating merely by parol. Up to this case, not a single decision is to be found giving countenance to any such proposition; and we are compelled to say, that, if the Court proceeded on the ground that the plaintiff had acquired the easement by the parol license, we do not think it can be supported. But the case may, perhaps, have been decided on another ground. The defendant himself was the party who had agreed to give the easement to the plaintiff; and although the action is stated to have been *an action on the case*, it may have been a mere *assumpsit* — an action on the case on *promises*; and in such an action the plaintiff would certainly be entitled to recover, if the contract was not (and probably the Court considered it was not) a contract concerning land, within the fourth section of the Statute of Frauds.”²

§ 299. The next English case is *Taylor v. Waters*.³ It was an action by the plaintiff against the door-keeper of the Opera-house, for preventing him from entering the house during the performance of an opera. It appeared that one W. Taylor, being in possession of the Opera-house, as a lessee, for a long term of years, by a deed dated the 24th of August, 1792, assigned his interest therein to trustees, on various trusts, for creditors and other claimants, and ultimately in trust for himself. After the execution of this deed, Taylor continued in possession, by the permission of the trustees, and he carried on and managed the affairs of the theatre. In March, 1799, he, by deed, granted to one

¹ Sugd. on Vend. & Pur. (last edit.) 139.

² *Wood v. Leadbitter*, *ub. sup.*

³ *Taylor v. Waters*, 7 Taunt. R. 374.

Gourgas, for a valuable consideration, six silver tickets, entitling the holders to admission to the theatre. One of these tickets was sold by Gourgas to the plaintiff in July, 1799, but no deed of assignment to him was executed. In 1800, Taylor's trustees took possession of the theatre. The plaintiff, however, was allowed to attend the theatre, by virtue of his ticket, until the year 1814, when the defendant Waters, as servant of the trustees, prevented him from entering the theatre; and for this obstruction the action was brought. The cause was tried before C. J. GIBBS, and a verdict found for the plaintiff, and that verdict was afterwards upheld by the Court of Common Pleas. The grounds of the judgment were, that the right under the silver ticket was not an interest in land, but a license irrevocable to permit the plaintiff to enjoy certain privileges thereon; that it was not required by the Statute of Frauds to be in writing, and, *consequently*, might be granted without a deed. The Chief Justice, in support of that doctrine, relied on *Webb v. Paternoster*, which, he said, showed that a beneficial license, to be exercised upon land, might be granted without deed, and could not be countermanded, at least after it had been acted on. The same case, he added, showed that the interest was not such an interest in land as was required by the Statute of Frauds to be in writing; as to which last point, all doubt, if there remained any, had (he said) been removed by the case of *Wood v. Lake*. This judgment is stated by the learned reporter, to have comprised the substance of the arguments on both sides, and which, therefore, he does not give in his report. It must be inferred from this, that the attention of the Court was not called in the argument to the principles and early authorities, to which we have

adverted. Brooke, in his Abridgment, Dodderidge, in the case of *Webb v. Paternoster*, and Lord Ellenborough, in the case of *Rex v. Horndon-on-the-Hill*, 4 M. & Selw. 562, all state in the most distinct manner, that every license is and must be in its nature revocable, so long as it is a mere license. Where, indeed, it is connected with a grant, there it may, by ceasing to be a naked license, become irrevocable; but then it is obvious that the grant must exist independently of the license, unless it be a grant capable of being made by parol, or by the instrument giving the license. Now, in *Taylor v. Waters*, there was no grant of any right at all, unless such right was conferred by the license itself. C. J. GIBBS gives no reason for saying that the license was a license irrevocable, and it cannot but be presumed that he would have paused before he sanctioned a doctrine so entirely repugnant to principle and to the earlier authorities, if they had been fully brought before the Court. Again, the Chief Justice is represented as saying that the interest of the plaintiff was not an interest in land, within the Statute of Frauds, and that *consequently* it might be granted without deed. How the circumstance, that the interest was not an interest in land within the Statute of Frauds showed it to be grantable without deed, is not discoverable. The precise point decided in *Webb v. Paternoster*, is not adverted to, and it is assumed, without discussion, that the license there must have been a parol license, and a naked license, unconnected with an interest, capable of being created by parol. The action was not, as it may have been in *Wood v. Lake*, an action founded on the contract. It was an action on the case for the obstruction, and was founded on the supposition that an actual right to enter and remain in the theatre had

vested in the plaintiff, under the license conferred by the silver ticket. With all deference, says Baron ALDERSON, to the high authority from which the judgment in *Taylor v. Waters* proceeded, we feel warranted in saying, that it is to the last degree unsatisfactory ;— an observation which we have the less hesitation in making, in consequence of its soundness having obviously been doubted by the Court of King's Bench, and Mr. Justice BAYLEY, in the case of *Hewlins v. Shippam*.¹

§ 300. The above case of *Taylor v. Waters*, was overruled by the decision of the Court of Exchequer, in 1845, in *Wood v. Leadbitter*. To an action of trespass for assault and false imprisonment, the defendant pleaded, that, at the time of the supposed trespass, the plaintiff was in a close of Lord E., and that the defendant, as the servant of Lord E., and by his command, *molliter manus imposuit* on the plaintiff to remove him from the said close, which was the trespass complained of. The plaintiff replied that he was in the close by the leave and license of Lord E. ; which was traversed by the rejoinder. The evidence was, that Lord E. was steward of the Doncaster races ; that tickets of admission to the Grand Stand were issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand, and the inclosure round it during the races ; that the plaintiff bought one of the tickets, and was in the inclosure during the races ; that the defendant, by order of Lord E., desired him to leave it, and, on his refusing to do so, the defendant, after a reasonable

¹ *Hewlins v. Shippam*, 5 B. & Cress. R. 221 ; Judgment of Baron Alderson, in *Wood v. Leadbitter*, *ub. sup.*

time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea. It was held, that on this evidence the jury were properly directed to find the issue for the defendant; and that a right to come and remain for a certain time on the land of another, can be granted only by deed; and a parol license to do so, though money be paid for it, is revocable at any time, and without paying back the money.¹

§ 301. The fourth and last English case, considered by Baron Alderson, was the more recent one in the Queen's Bench.² That was an action for trespass *quare clausum fregit*; plea, that defendant was possessed of a large quantity of hay, being on the plaintiff's close, and that by leave of plaintiff he entered on the close in question, to remove it. Replication, *de injuria*. It was proved at the trial, that the hay in question was sold in January, 1838, by the plaintiff's landlord, who had seized it as a distress for rent. The conditions of the sale were, that the purchaser of the hay might leave it on the close until Lady-day, and might in the mean time come on to the close from time to time, as often as he should see fit, to remove it. *These conditions were assented to by the plaintiff*. The defendant became the purchaser, and afterwards, and before Lady-day, the plaintiff locked up the close. The defendant broke open the gate, in order to remove the hay. A verdict was found for the defendant, ERSKINE, J., telling the jury, that the license to come from time to time to remove the hay was irrevocable. Mr. Crowder moved to

¹ Wood v. Leadbitter, 13 M. & Welsb. R. 837, *ub. sup.*

² Wood v. Manley, 11 Adol. & Ell. R. 34.

set aside this verdict, on the ground that the license was necessarily revocable, and was in fact revoked. But the Court of Queen's Bench refused to grant a rule, and we think quite rightly. This was a case not of a mere license, but of a license coupled with an interest. The hay, by the sale, became the property of the defendant, and the license to remove it became, as in the case of the tree and the deer, put by C. J. VAUGHAN, irrevocable by the plaintiff; and the rule was properly refused. The case was analagous to that of a man taking my goods, and putting them on his land, in which case I am justified in going on the land and removing them.¹ It appears, therefore, that the only authority necessarily supporting the present plaintiff in the proposition for which he is contending, is the case of *Taylor v. Waters*, in which the real difficulty was not discussed, nor even stated. It was taken for granted, that, if the Statute of Frauds did not apply, a parol license was sufficient, and the necessity of an instrument under seal, by reason of the interest in question being a right in nature of an easement, was by some inadvertence kept entirely out of sight; and for these reasons, even if there had been no conflicting decisions, we should have thought that case to be a very unsafe guide in leading us to a decision, on an occasion where we were called on to lose sight of the ancient landmarks of the Common Law. We are not, however, driven to say that we shall disregard that case *merely* on principle. Giving it the full weight of

¹ Vin. Abr. Trespass, (H.) a 2, pl. 13; and *Patrick v. Colerick*, 3 M. & W. R. 483.

judicial decision, it is met by others, which we must entirely disregard, before we can adopt the argument of the plaintiff. In the case of *Fentinam v. Smith*,¹ and *Rex v. Horndon-on-the-Hill*,² which were before *Taylor v. Waters*, Lord Ellenborough and the Court of King's Bench, expressly recognized the doctrine, that a license is no grant, and that it is in its nature necessarily revocable, and the further doctrine, that, in order to confer an incorporeal right, an instrument under seal is essential. And in the elaborate judgment of the Court of King's Bench, given by BAYLEY, J., in *Hewlins v. Shippam*,³ the necessity of a deed, for creating any incorporeal right, affecting land, was expressly recognized, and formed the ground of the decision. It is true, that the interest in question in that case was a freehold interest, and on that ground BAYLEY, J., suggests that it might be distinguished from *Taylor v. Waters*; but in an earlier part of that same judgment, he states, conformably to what is the clear law, that, in his opinion, the quantity of interest made no difference; and the distinction is evidently adverted to by him, not because he entertained the opinion that it really was of importance, but only in order to enable him to decide that case without, in terms, saying that he did not consider the case of *Taylor v. Waters* to be law. The doctrine in *Hewlins v. Shippam* has since been recognized and acted upon in *Bryan v. Whistler*,⁴

¹ *Fentinam v. Smith*, 4 East, R. 107.

² *Rex v. Horndon-on-the-Hill*, 4 M. & Sel. R. 565.

³ *Hewlins v. Shippam*, 5 B. & Cress. 222.

⁴ *Bryan v. Whistler*, 8 B. & Cress. 288.

Cocker v. Cowper,¹ and *Wallis v. Harrison*,² and it would be impossible for us to adopt the plaintiff's view of the law, without holding all those cases to have been ill decided. It was suggested that, in the present case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference ; whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed ; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil ; and it is sufficient, on this point to say, that in several of the cases we have cited, (*Hewlins v. Shippam*, for instance, and *Bryan v. Whistler*), the alleged license had been granted for a valuable consideration, but that was not held to make any difference.

§ 302. In the United States, as in England, there have been some decided cases which approach to, and favor the doctrine in *Wood v. Lake, &c.* ; and the cases of *Ricker v. Kelley*,³ and *Clement v. Durgin*,⁴ in Maine, have been held by the Supreme Court of New York to let in a verbal distinction, under which, "if retained and made applicable in its full extent, the Statute of Frauds would in many important respects be re-

¹ *Cocker v. Cowper*, 1 C. M. & R. 418.

² *Wallis v. Harrison*, 4 M. & Welsb. 538.

³ *Ricker v. Kelley*, 1 Greenl. (Me.) R. 117.

⁴ *Clement v. Durgin*, 5 Greenl. (Me.) R. 9, 13 ; and see *Blanchard v. Baker*, 8 Greenl. (Me.) R. 258.

pealed.”¹ In *Mumford v. Whitney*, in New York,² in 1836, the principal English and American authorities on the subject, down to that period, were carefully reviewed and compared with each other, and the opinion of the Court was directly opposed to the doctrine, that parol licenses are irrevocable. The question which the case presented, was, whether a parol agreement, that a party may abut and erect a dam upon the land of another, not for a temporary, but for a permanent purpose, as the erecting of water power

¹ *Miller v. Auburn and Syracuse Railroad Co.* 6 Hill, (N. Y.) R. 61. There are cases in other States also, to which the above comments by the Supreme Court of New York are not entirely inapplicable. It was held in New Hampshire, that where A gave a parol license to B, to erect a dam on A's land, *for the benefit of both*, that after the license had been executed, it could not be revoked, without tendering to B the expenses of erecting the dam; and that if it could be revoked, it would be as much the business of A as of B to remove the dam. *Woodbury v. Parsley*, 7 N. Hamp. R. 23. So in the same State, it was held, that a license to build and maintain a bridge on another's land, may be proved by parol, and is not such an easement or interest in land as to be within the statute of frauds. *Ameriscoggin Bridge v. Bragg*, 11 N. Hamp. R. 102. In a case in the Supreme Court of Georgia, A and B were joint owners of a lot of land, and no partition had been made between them. It was, however, understood, that A should have the east, and B the west end of the tract. B agreed that A might erect a mill on his, A's half, and cut as much timber off the west half and overflow as much of the land as might be necessary for that purpose. Afterwards B sold to C, the latter having agreed expressly with A to abide by these stipulations, which B exacted from him before he would consent to sell. After the dam was partly constructed, and timbers collected for building the mill, C sold to D, who shortly thereafter notified A to discontinue the work, and, upon his refusal, brought an action of trespass for the overflowing of his land by backwater. It was held, that, under the above circumstances, the action could not be maintained, and that the original parol agreement could not be revoked, after it had been executed at the defendant's expense. *Speffield v. Collier*, 3 Kell. (Geo.) R. 82.

² *Mumford v. Whitney*, 15 Wend. (N. Y.) R. 380.

for the use of mills, and other hydraulic works, is void, within the Statute of Frauds ; and it was decided, that it was void within that statute. The decision in this case, and the general doctrine laid down by the Court, were expressly recognized and approved by the Supreme Court, in 1843, when the Court were of opinion, that if a contrary doctrine was established, "parol licenses irrevocable would be made, in effect, to pass estates of freehold ; and the well-established rule of the Common Law too, that easements and other incorporeal hereditaments shall pass by deed only, would be nearly repealed. You have only to throw the grant into the form of a parol license, and, on its being executed, both the Statute and the Common Law are evaded." Therefore, the owner of lands cannot grant the right to enter upon and occupy them by a railroad for an indefinite time, without a conveyance sufficient to carry a freehold.¹ In another case in New York, decided at a much earlier period than either of the above-mentioned, it appeared, that one G. gave a parol license in writing to one H., to build a house about the mineral spring at New Lebanon, and to occupy it during his necessity or pleasure, and that H. built a small house which he occupied for seventeen years, and then sold it to one C. The Court held, that H. had only a personal license, or privilege to inhabit, and had no title to the premises ; and that his sale to C. put an end to the privilege.²

§ 303. The doctrine in North Carolina is, that a parol license may be countermanded, and this "to

¹ *Miller v. Auburn and Syracuse Railroad Co. ub. sup.*

² *Jackson v. Hull*, 4 Johns. (N. Y.) R. 418.

avoid the danger of changing or affecting a man's real property by suborned oaths."¹ In *Bridges v. Purcell*, in that State,² it was held, that a verbal authority to overflow land by a mill-dam, necessarily ceased *with the life of the person giving it*. In this case, the Court, by GASTON, J., said, — "It is often difficult to distinguish between a license and a mere authority, and an interest or a license coupled with an interest. It necessarily follows, that what is done under either, while in force, is binding upon him who has granted it. Until the license was revoked, the keeping of the water upon the land was lawful. It is a general principle, that a mere license may be countermanded; and it is equally a general principle, that an interest once passed cannot be recalled. The extent of the grant, whether it be of an authority or an interest, depends not on any technical words, but upon the intention of the parties. Whether a license to do an act which in its consequences permanently affects the property of him who gives it, when so acted on, that what is done cannot be conveniently undone, may be regarded as the grant of an interest to the extent of the consequences thereby authorized, and therefore not revocable; or whether such license does not necessarily imply a permission for the thing done to remain, notwithstanding the continuing consequences; and therefore the licensor, on a principle of good faith, may be forbidden to withdraw it, without indemnifying him who trusted thereto; whether these or either of these principles can be extracted from the adjudications, we are of opinion, that

¹ *Anon v. Deberry*, 1 Hay. (N. C.) R. 248.

² *Bridges v. Purcell*, 1 Dev. & Batt. (N. C.) R. 492.

they do not uphold the instructions complained of.¹ The right to pond water on another's land, is an incorporeal hereditament, a right not indeed to the land itself, but to a privilege on and upon the land, impairing to that extent the dominion of the proprietor therein. Set up as a permanent interest granted to the vendor of the plaintiff, transferable by him, passing with the land to the defendants, it is inoperative, because it is a freehold interest, and cannot pass but by deed. Regarded as a mere license, however irrevocable, between the parties, (if, indeed, there can be such without an interest,) it is difficult to see how it can be binding between the plaintiff and the defendants. The ancestor of the plaintiff granted a *license*, and the plaintiff has succeeded to all his *estate*. Now, if the effect of the license be not to pass any interest out of, or impose any charge upon the land, the plaintiff has succeeded to an unlimited and unshackled fee-simple therein. A mere authority necessarily ceases with the life of the grantor. The plaintiff's ancestor granted a license to the *vendor of the defendants*; but regarded as a *license*, how does it inure to the benefit of the defendants? If it passed as an *appurtenance* to the land, it partook of its nature; it was more than an authority, it was an hereditament. To hold, that a permission thus given, shall operate forever for the benefit of the grantee and his assigns, against the grantor and his heirs, would be in effect to permit a fee-simple estate to pass under the name of an irrevocable license. Purchasers would never know what encumbrances

¹ The instructions to the jury were, that the plaintiff could not recover unless the dam had, subsequently to the license, been raised higher.

were on their lands, and instead of the solemn and deliberate instruments which the law requires as the indispensable means of transferring freeholds, valuable landed interests would be made to depend wholly on the integrity, capacity, or recollection of witnesses."

§ 304. In *Hays v. Richardson*, in the Court of Appeals of Maryland,¹ it was held, that an authority to open and to keep open a way through a field, must be executed under the hand and seal of the owner of the land, and recorded. In giving the opinion of the Court, DORSEY, J., commented with censure and severity upon the cases of *Wood v. Lake*, and *Taylor v. Waters*, and he said, "We feel no disposition for the sake of analogy, to give a similar interpretation to our Act of Assembly of 1766, regulating the execution and enrolment of conveyances of real property, to that given in *Wood v. Lake* to the Statute of Frauds. The language of its provision comprehends the privilege attempted to be conferred by the instrument before us, and the policy of the law, the interests and convenience of the public, forbid that we should restrict its operation. In no other way can the leading object of the legislature, the 'securing the estates of purchasers,' be effected. Their design was, that all rights, encumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records. If parol or unrecorded licenses of the character of that in controversy were tolerated, frauds and losses upon purchasers would be innumerable, as may readily be imagined."²

¹ *Hays v. Richardson*, 1 G. & Johns. (Md.) R. 366.

² In *Wright v. Freeman*, in Maryland, 5 H. Johns. (Md.) R. 467, it was held by the Court of Appeals, of that State, that a simple parol agree-

§ 305. It was expressly held by the Supreme Court of Massachusetts, in the year 1814, that licenses, which in their nature amount to the granting of an *estate* for ever so short a time, are not good without deed.¹ The defendant, in the case referred to, claimed by his plea a right to enter upon the plaintiff's close for the purpose of repairing a dam, &c.; because those whose estate the plaintiff then held permitted him to enter for that purpose. From this permission he sought to infer a right to enter whenever the state of the mill owned by him required it. Aware that he could not set up any estate of a permanent nature in the plaintiff's close, without averring and proving a deed, or some other lawful conveyance, he maintained that the fact alleged in his plea amounted to a license given him by the former owner of the land to make and repair the dam, &c.; and contended, first, that such license may be by parol; and, secondly, that it is not in its nature countermandable. PARKER, C. J., in delivering the opinion of the Court, said,—“The argument had some plausibility in it, when it was first stated; but upon more mature consideration, it seems to have no foundations in principles of law. A license is technically an authority given to do some one act or a series of acts on the land of another, without passing any estate in the land; such as a license to hunt, a license to cut down a certain number of trees. These are held to be revocable when executory, unless a definite term is fixed, but irrevocable when executed. It is also holden

ment could not operate to extinguish an old right of way, or to create a new one; and that, as a parol license, it might be revoked by either party.

¹ Cook v. Stearns, 11 Mass. R. 538.

that such licenses to do a particular act, but passing no estate, may be pleaded without deed. But licenses which in their nature amount to the granting of an estate for ever so short a time, are not good without deed, and are considered as leases, and must always be pleaded as such. It was also argued in this case, that, by the act providing for the support and regulation of mills, a right to acquire property in the land of another for the purpose of erecting or carrying on a mill, was contemplated to exist by parol. But the Court held, that the act referred to did not provide a mode of acquiring title to the mill on the land; but merely super-added the right of flowing land, upon compensation, according to the statute, by those who had legally obtained the right to build a mill.¹

§ 306. In *Benedict v. Benedict*, in Connecticut,² the Court seem to have adopted the ancient doctrine of the Common Law, that a fixed and permanent building erected upon another's land, even by his license, became his property; but if in its nature and structure it was capable of being removed, and a removal was contemplated by the parties, it was personal estate in the builder; and in case the license should be improperly revoked, the only remedy, said SWIFT, J., is in equity. In *Prince v. Case*, in that State,³ it appeared A was owner in fee-simple of a tract of land, and that, in 1817, he gave B liberty to erect a dwelling-house for his use

¹ The Supreme Court of Massachusetts, in *Whitmarsh v. Walker*, 1 Met. (Mass.) R. 331; *Dyer v. Sandford*, 9 Ibid. 395; *Seymour v. Carter*, 2 Ibid. 520, recognize and expressly concur in the doctrine laid down in *Mumford v. Whitney*, in New York, see Ante, § 302, namely, "that a permanent interest in land can be transferred only by writing.

² *Benedict v. Benedict*, 5 Day, (Conn.) R. 469.

³ *Prince v. Case*, 10 Conn. R. 310.

on said land ; B erected it accordingly, and lived therein until 1828, when he died. Before the event of his death, he executed a deed of such house to C, his son. A had previously conveyed the land to D *by deed*, containing no notice or exception of such license. In 1829, D brought ejectment for the land and house against the person then in possession, recovered judgment, and in July, 1831, by virtue of an execution, was put into possession, and so continued until the fall of 1832, when he took down the house, thereby destroying it as such, but did not take away the materials. In an action of trespass brought by C against D, it was held that D was not liable. In this case, the Court say, that a license given to erect a dam on the land of another, and continue it there for ever, the license to *continue* it would not be irrevocable, as it would be "in the face of the statute which requires all conveyances of an interest in lands to be in writing." In *Branch v. Doane*, in Connecticut,¹ the Court say,—“If the words, whatever they may be, which confer authority on another to take possession of land, are not accompanied with language or stipulations which evince such a contract between the parties (a lease,) they would amount to a mere license, which would indeed be a sufficient excuse on a charge of trespass by the owner, but would not amount to a lease, nor convey any estate or interest in land.”

§ 307. In Vermont, it is held, that a parol license to flow, is on account of the Statute of Frauds countermandable at will, even if executed ; but, at the same time, the opinion is entertained, that if expense has been incurred, so that the parties cannot be placed *in*

¹ *Branch v. Doane*, 17 Conn. R. 402.

statu quo, the person so expending it is entitled to relief in equity.¹

§ 308. It has been considered, that the result of the authorities as to the revocation of executed parol licenses, is the establishment of a distinction between a license executed upon land of the *licenser*, and one executed upon the land of the *licensee*, which, in its consequences, is prejudicial to the land of the licenser.² But it is apprehended, that this is true only as it regards *light*, or at least that such a rule is wholly inapplicable to a watercourse; and that it is so, we shall endeavor to show. The principal authorities which seem to be relied on in support of the proposition above stated, are *Winter v. Brockwell*,³ and *Liggins v. Inge*.⁴ These two cases require a careful attention, in order accurately to compare them, and thus render obvious the fallaciousness of the conclusion arrived at as above mentioned.

§ 309. The declaration in *Winter v. Brockwell*, stated that the plaintiff was entitled to an easement of a passage for light and air to his dwelling-house, through an ancient window, over an open space of land of the defendant, and that, by means of such open space, noisome smells from the defendant's house evaporated, without occasioning any nuisance to the occupier of the plaintiff's house, and that the defendant wrongfully erected a sky-light above the plaintiff's ancient window, and covering the open space above-

¹ *Hall v. Chaffee*, 18 Vermt. R. 150.

² Such is the conclusion arrived at by a writer in the 34th Vol. of the *London Law Magazine*, p. 129.

³ *Winter v. Brockwell*, 8 East, R. 308.

⁴ *Liggins v. Inge*, 7 Bing. R. 682.

mentioned, by means of which "the light and air were prevented entering the plaintiff's window and into the house, and noisome smells, arising from the adjoining house, were prevented from evaporating, and entered the plaintiff's dwelling-house." The defendant pleaded the general issue. It appeared in evidence, that the open space "which belonged to the defendant's house had been inclosed and covered by a sky-light in the manner stated, *with the express consent and approbation of the plaintiff*, obtained before the inclosure was made, who also gave leave to have part of the framework nailed against his wall; some time after it was finished, the plaintiff objected to it, and gave notice to have it removed; but Lord ELLENBOROUGH was of opinion, that the license given by the plaintiff to erect the sky-light, having been acted on by the defendant and the expense incurred, could not be recalled, and the defendant made a wrongdoer, at least not without putting him in the same situation as before, by offering to pay all the expenses which had been incurred in consequence of it. And under this direction the defendant obtained a verdict." On motion for a new trial, in support of which no argument appears to have been advanced, the learned Judge said,—"That the point was new to him when it occurred at the trial, but then he thought it very unreasonable, that, after a party had been led to incur expense in consequence of having a license from another to do an act, and the license had been acted upon; that the other should be permitted to recal his license, and treat the first as a trespasser for having done that very act. That he had afterwards looked into the books upon this point, and found himself justified by the case of *Webb v. Pater-*

noster,' where HAUGHTON, J., lays down this rule, that a license executed is not countermandable, but only where it is executory. And here the license was executed."²

§ 310. The above case appears to have undergone very little consideration; but it may here just be mentioned, that the decision is sustained by all those decisions that have before been considered, wherein it is held, that an easement may be abandoned and *extinguished* (not *created*) by the party entitled to it, by express permissions, accompanied by corresponding acts, on his part.

§ 311. In the other case of *Liggins v. Inge*, (a case of palpable misapprehension of the law), it appeared, that the predecessor of the plaintiff, who was entitled to a flow of water to his mill, over the defendant's land, by a *parol* license, authorized the defendants to cut down and lower a bank, and to erect a weir upon their own land, the effect of which was to divert into another channel the water which was requisite for the working the plaintiff's mill. Subsequently the plaintiff complained to the defendants of the injurious effects of the weir, and called upon them to restore the bank to its ancient height, and to remove the weir; and, upon refusal on the part of the defendants to do this, an action was brought. The Court held the *parol* license not to be revocable, on the ground, that it had been executed.

¹ In *Blanchard v. Bridges*, 1 Adol. & Ell. R. 536, it was decided, that a license simply to *set a ladder* on the land of another, could not be construed to extend by implication to making a window to look on the premises of the licenser.

² Cited Ante, § 244 - 253.

The argument on the part of the plaintiff, very properly was, that such a parol license was in its nature countermandable at any time, at the pleasure of the party who gave it; that to hold otherwise would be to allow to a parol license the effect of *passing to the defendants a permanent interest* in part of the water which before ran to the plaintiff's mill; which interest could only pass by grant under seal. But TINDAL, C. J., in his judgment, said, — "We do not consider the object, and still less the effect, of the parol license, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such water no longer for the purpose of his mill; that he *gave back again and yielded up*, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, that after he has once *signified such relinquishment*, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or throw on those other persons the burden of restoring matters to their former state and condition. The learned Judge cites as authority, the case of *Winter v. Brockwell*; and he besides assumes, that water is *publici juris*, and that the plaintiff's right to the use of the water was derived from *occupancy*, and considers that there is nothing unreasonable in adjudging that a right which is *thus* gained, may be lost by *abandonment*. Before proceeding to comment upon this judgment of the learned Judge, we will give

an account of a decision in a case in Maryland, to which our proposed comments will equally apply; as it was made on the authority of this case, and on that of *Winter v. Brockwell*.¹

§ 312. The action in the Maryland case was an action on the case for the diversion of a watercourse. The defendant offered to prove by parol evidence, that, before the diversion of the water, it was agreed verbally between the plaintiff and the defendant, that the defendant might divert the watercourse in the manner complained of, for the purpose of erecting a mill in contemplation by the defendant, on his land, if he, the defendant, would allow the plaintiff the use of a certain way leading from the plaintiff's land and through the defendant's; and that, in pursuance of said agreement, the plaintiff was allowed the use of said way, and did use the same; and that the defendant went on, and at great expense, (upwards of \$4,000,) with the knowledge of the plaintiff, and without objection, and with encouragement on his part, to complete the mill as had been agreed; and that no objection was made by the plaintiff to the defendant's diverting the watercourse, until after the completion of the mill, and that in case the water was withdrawn from the defendant's mill, and restored to its ancient channel, the defendant's mill would be rendered useless and of no value. Upon the objection of the plaintiff's counsel, the Court (ARCHER, C. J.,) refused to permit the foregoing facts to go to the jury for the purpose aforesaid. The verdict and judgment being against the defendant, the judgment, on appeal to the Court of

¹ See Ante, § 309.

Errors, was reversed, the Court relying upon *Winter v. Brockwell*, and *Liggins v. Inge*.¹

§ 313. Now, in the case of a *prescriptive* right to light, (as in the case of *Winter v. Brockwell*,) it is not in collision with well-established authority, but, on the other hand, in accordance with it, that a parol license to do any act on the land of the licensee by the licensor, inconsistent with and in derogation of such right, is irrevocable, because the title to this right of the licensor becomes thus *extinguished*.² An easement is not *created*, but an existing one voluntarily abandoned and *surrendered*. But how can this doctrine of extinguishment be applied to a natural watercourse? Not upon the ground upon which it is put by Mr. C. J. TINDAL, that the riparian owner's right to the water is derived from an actual *occupation* of the water; for it has been already clearly shown, that the law is otherwise.³ It is indeed agreed in all the cases, that where a natural watercourse is diverted, the plaintiff need not aver and prove a *prescriptive* right.⁴

§ 314. It is important to note the broad distinction there is, in the eye of the law, between a right to *light* and the right to the *water* of a natural watercourse. The owner and occupier of a house has *prima facie* no right to light which enters his windows *sideways*; it must be by grant, or by prescription, which supposes

¹ *Addison v. Hack*, 2 Gill, (Md.) R. 221.

² Refer Ante, § 244 - 258.

³ Ante, § 130 - 136, 245. The object of the judgment in *Mason v. Hill*, (cited Ante, § 133,) says a learned writer, was to set right the *mis-taken* notion which had got abroad, that flowing water was *publici juris*, and that the first occupant may appropriate it. 1 Cra^{bb}, Real Prop. § 399.

⁴ See Ante, note to § 123, p. 127.

one. Both he and the adjoining land-owner only own the light *upwards*, *cujus est solum, ejus est usque ad coelum*. There was, therefore, no *interest in land* conveyed in *Winter v. Brockwell*, and the licenser's interest in his land remained as complete as it was originally, and the license was only something collateral to the land.¹ In respect to a natural watercourse, it is directly otherwise; and the right which a riparian proprietor upon it has, as to the use of the water, is, by the force of the maxim above-mentioned, a part of the *freehold*; ² and to deprive him of it by a diversion, would be a deprivation of what is inseparably connected with and inherent in the land; of what, in fact, is parcel of the inheritance, and which passes with it.³ The purchaser of land over which a watercourse, *ex jure naturæ*, runs, has a corporeal tenement, and the right which he possesses, in respect of his watercourse, is real. It is not, like an easement, or an appurtenance, something superadded to the general property of the estate, but something which always formed a part of it. To render the estate of the lower riparian proprietor servient to the upper to divert the water, would be an easement in the estate of the latter.⁴ It is a right tangible, and its existence is not merely in idea or abstracted contemplation,⁵ and is, in short, an INTEREST IN LAND. Hence it is we find Lord ELLENBOROUGH ruling, in 1807, the license in *Winter v.*

¹ See *Donellan v. Read*, 3 B. & Adol. R. 899; and see *Ante*, § 257, 258.

² *Ante*, § 5, 8.

³ *Ante*, § 90, *et seq.*

⁴ *Ante* § 141.

⁵ See *Le Fevre v. Le Fevre*, 4 S. & Rawle, (Penn.) R. 245; and see *Frey v. Witman*, 7 Barr, (Penn.) R. 440.

Brockwell to be irrevocable, when, in 1803, in *Fentinam v. Smith*, he held, that the title to have the *water flowing in the tunnel over the defendant's land*, could not pass *without deed*.

§ 315. In the above case of *Fentinam v. Smith*,¹ the action was brought for diverting a watercourse from the plaintiff's mill. The declaration stated the plaintiff's possession of the mill, and that by reason thereof he was entitled to the use and benefit of the water of a rivulet, which, until the interruption complained of, flowed through a tunnel into another stream, whereon the plaintiff's mill was built; but that the defendant cut a channel, and thereby diverted the water from running into said tunnel, and so to the mill. It appeared at the trial, that the tunnel was made in the defendant's land, and fixed into the ground with stone-work; that the defendant agreed for a guinea, to let the plaintiff lay the tunnel, for the purpose of conveying the water to the mill; that the defendant even assisted at the making of the tunnel under the plaintiff's directions; but no conveyance was made of the land to the plaintiff. The guinea was afterwards tendered to the defendant, but he refused to receive it, or give his assent to the continuance of the tunnel, and made the obstruction complained of. A verdict having passed to the plaintiff with leave to move or enter a nonsuit, in opposition to a rule obtained for this purpose, it was contended, "that it was sufficient for the plaintiff against a wrongdoer, to declare upon his possession of the mill with the appurtenants." But Lord ELLENBOROUGH said:—

¹ *Fentinam v. Smith*, 4 East, R. 107.

“Such an allegation could not be sustained without showing that the appurtenants were *legally* such. Now here, the title to have the water flowing in the tunnel over the defendant's land could not pass by parol license over the defendant's land, without deed, and the plaintiff could not be entitled to it, as stated in the declaration, by reason of his possession of the mill; but he had it by license of the defendant, or by contract with him; and if by license, it was revocable at any time. The enjoyment, with the defendant's assent, was not left as evidence to the jury to presume a grant, but it was supposed that it gave a title in point of law, which it clearly did not.

§. 316. It is now indeed considered in England, (whatever doubts may have formerly existed as to the creation of easements, by express agreement,) to be at this time fully settled, that, like all other incorporeal hereditaments, they can be *created* only by an instrument under seal; that the utmost effect of a license is, that it may work the *extinguishment* of an existing easement; as where permission is given to a man to erect something on his own land which is incompatible with the continuance of some easement over it, to which the licensor was entitled.¹ The proper application of the doctrine to a natural watercourse is, that if A has acquired a prescriptive right, or a right by an express grant, to divert the water, and convey it around the land of B, the next adjoining lower proprietor; and should be induced to consent that B might in future apply the whole of the stream to a mill, provided he would erect one; and A should carry

¹ Gale & What. on Easem. 14.

the license into effect, by the removal of the obstruction, by means of which the water had been diverted and enjoyed, and B, on his part, should carry it into execution by building the mill, — then the easement is irrevocably gone.¹

§ 317. It is occasionally observable in the judgments of Courts of Law, that intimations are made of the *equitable* relief which might be obtained in the case of a parol license executed, in Chancery; and in Pennsylvania it has been peculiar to its jurisprudence, that the Courts of Law are governed by equitable rules, and, through the instrumentality of a jury, grant relief as a Chancellor does;² and there have been many decisions in that State in favor of the admission of parol evidence at law, in contradiction to written instruments.³ How far the decisions at law, which have been reviewed, will accord with the rule of Equity, which sometimes enforces parol conveyances made on valuable consideration, and executed by possession, we proceed next to consider.

4. *The Equitable Doctrine Concerning Parol Licenses.*

§ 318. There appears to be no doubt that, in Equity, licenses executed are taken out of the Statute of Frauds, and that relief may be had in equitable tribu-

¹ See *Frey v. Witman*, 7 Barr, (Penn.) R. 440.

² 4 Kent, Comm. 168, note; 1 Story, Eq. Juris. § 58; 6 Whart. (Penn.) R. 540.

³ 14 S. & Rawle, (Penn.) R. 285; 1 Ibid. 464; 6 Ibid. 171. In Pennsylvania, the part of the English Statute by which a trust is prohibited in lands, has not been enacted; and therefore it has been held, in that State, that the gift of a lot for a school-house to be erected by contribution, created a trust for the purpose of the contributors. *Schwartz v. Schwartz*, 4 Barr, (Penn.) R. 353; *Martin v. McCord*, 5 Watts. (Penn.) R. 27.

nals by the licensee against an action at law. The decisions of the Courts of Equity on that statute, proceed on the principle, not that the right passes by parol license or agreement, but that wherever one party has executed it, by payment of money, taking possession, and making valuable improvements, the conscience of the other is bound to carry it into execution; and Equity will compel him to do it.¹ Thus, in the case of *laches*; as where one party stood by and saw his watercourse diverted; but, instead of preventing it, encouraged the work while it was going on; and, afterwards brought his action at law; the defendant, on his application to the Court of Chancery, obtained an injunction.² *Short v. Taylor*,³ is a similar case, in which Lord Somers also granted an injunction. So in the case of long possession of a watercourse by the plaintiff, the defendant having cut a channel on his own land, and set up a sluice so as to divert the stream, the Court, on proof by the plaintiff, decreed for him, without sending him to try his right at law.⁴ But, as a rule, Equity will not grant relief until the parties have tried their rights at law.⁵ So if there have been *laches*, and erections complained of have been suffered to remain any length of time; the Court will not interpose by injunction.⁶

¹ *Le Fevre v. Le Fevre*, 4 S. & Rawle, (Penn.) R. 241; *M'Kellip v. M'Ilhenny*, 4 Watts, (Penn.) R. 317. The license may be given by the known agent of a company, which, if carried into effect, will bind the company. *Ibid.*

² *Anon.* 2 Eq. Cases Abr. 523, pl. 3.

³ Cited *ibid.*

⁴ *Whitechurch v. Hide*, 2 Atk. R. 391.

⁵ 2 Vern. R. 391, n. 1.

⁶ See further, *Bush v. Western*, Prec. Chan. 536; *Dorset v. Girdler*, *Ib.* 531; *Hilton v. Lord Scarborough*, 4 Vin. Abr. 425; *Weller v. Smeaton*, 1 Br. C. C. 572; S. C. 1 Cox, R. 102.

§ 319. The above case of the watercourse, and that of *Short v. Taylor*, were recognized and sanctioned by Lord Chancellor Cottenham as late as 1841, who, on that occasion, said, — “I think it impossible after these two cases, to say, that a party may not so encourage that which he afterwards complains of as a nuisance, as not only to preclude him from complaining of it in this Court, but to give the adverse party a right to the interposition of this Court in the event of his complaining of the nuisance at law.”¹ His Lordship also referred to the case² in which Lord Manners held, that it was the duty of a party, seeing a nuisance in progress, to give notice to the party erecting the nuisance, of his intention to object; and in reference to it, said, — “It is unnecessary to say under what circumstances a party might be affected by that course of conduct, but certainly it is a recognition by Lord Manners that such a case might exist.”

§ 320. *Wetmore v. White* in New York, in 1805,³ was a case in Equity, in which it was held by the Court of Errors, that if the water of a watercourse be owned by two persons, whose lands are on opposite sides, and they agree to erect mills on the land of one, and turn the whole stream to the mills; it is an appropriation of the water to the mills. It was contended, that parol agreements having been in part executed, took the case out of the Statute of Frauds. The case having been heard in the Court of Chancery, the appellant's bill was dismissed with costs, but in the Court of Errors there was a unanimous judgment for rever-

¹ *Williams v. Earl of Jersey*, 1 Craig. & Phillips, Ch. R. 97.

² *Jones v. The Royal Canal Co.* 2 Molloy, Ch. R. 319.

³ *Wetmore v. White*, 2 Caines, (Ca. in Error) 87.

sal. The judgment was delivered by Mr. J. THOMPSON, who held it to be an established rule in Equity, that a parol agreement, in part performed, was not within the provisions of the Statute of Frauds. "To allow," says he, "a statute, having for its object the prevention of frauds, to be interposed in bar of the performance of a parol agreement, in part performed, would evidently encourage the mischiefs the legislature intended to prevent."

§ 321. In an injunction bill filed in the Court of Chancery of New Jersey, it was held, that if waste-gates be constructed by the defendants, and used by them for a course of years, (four years,) with the assent of the complainants; the complainants cannot have relief by injunction so long as the use of the gates is confined to their original purpose; but if there is an attempt to apply them to a different purpose, and one injurious to the complainants, the Court will by injunction entirely prohibit the use of the gates. It was further held, that although such new improvement was commenced in the summer, and carried on during the ensuing fall and winter, but not completed till February, when the complainants' bill for an injunction was filed, the complainants have not lost their remedy by injunction.¹

§ 322. A parol license, without consideration, was given in Pennsylvania, to use the water of a stream for a saw-mill, in consequence of which the grantee incurred the expense of erecting a mill; it was held by the Supreme Court of Pennsylvania, that (notwithstanding the want of consideration) the license could

¹ *Hulme v. Shreve*, 3 Green, (N. J.) Ch. R. 116.

not be revoked at the pleasure of the grantor ; and that if the grantor diverted the water to the injury of the grantee, the latter might maintain an action. Such a license, the Court said, was a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. That a party, it was observed by the Court, should be let off from his contract, on payment of a compensation in damages, is consistent with no principle of morals. GIBSON, J., in delivering the opinion of the Court, remarked, — “ Why should not such an agreement be decreed in specie ? That a party should be let off from his contract, on payment of a compensation in damages, is consistent with no system of morals, but the Common Law, which was, in this respect, originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence the judgment of a Court of Law operates on the right of a party, and the decree of a Court of Equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy. How very inadequate it would be, in a case like this, is perceived by considering, that a license which has been followed by the expenditure of ten thousand dollars, as a necessary qualification to the enjoyment of it, may be revoked by an obstinate man who is not worth as many cents. But, besides this risk of insolvency, the law, in barely compensating this want of performance, subjects the injured

party to risk, from the ignorance or dishonesty of those who are to estimate the *quantum* of the compensation. In the case under consideration, no objection to a specific performance can be founded on the intrinsic nature of the agreement; nor, having been partly executed, on the circumstance of its resting in parol; but it is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent. A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or any thing else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case, the parties might perhaps be thought to be remitted to their former rights. But having had in view an unlimited enjoyment of the privilege, the grantee has purchased by the expenditure of money, a right, indefinite in point of duration, which cannot be forfeited by non-user, unless for a period sufficient to raise the presumption of a release. The right to rebuild, in case of destruction or dilapidation, and to continue the business on its original footing, may have been in view, as necessary to his safety, and may have been an inducement to the particular investment in the first instance. The cost of rebuilding a furnace, for instance, would be trivial, when weighed with the loss that would be caused by breaking up of the business, and turning the capital into other channels; and therefore a license to use water for a furnace would endure for ever. But it is otherwise, where the object to be accomplished is temporary. Such usually is the object to be accom-

plished by a saw-mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business is necessarily at an end. But, till then, it constitutes a right for the violation of which redress may be had by action. With this qualification it may safely be affirmed, that expending money or labor in consequence of a license to divert a watercourse, or use a water power in a particular way, has the effect of turning such license into an agreement that will be executed in equity. Here it was not pretended that the license had expired, and we are unable to discover an error in the opinion of the Court on the points that were propounded.”¹

§ 323. In reference to the above case, it has been asserted, that the principle of it is, that the revocation of it would be a fraud ; and that to prevent it, a Chancellor will turn the owner of the soil into a trustee *ex maleficio*. Or, it is in substance the same which postpones the title of one who is studiously silent as to the existence of it, in the presence of a purchaser from a third person ; or of one who suffers to build ignorantly on his ground without informing him of his mistake.²

§ 324. In *Le Fevre v. Le Fevre*,³ parol evidence was regarded admissible to prove, that after the execution of a deed of conveyance of a right to a watercourse through the land granted by courses and distances, a verbal agreement was entered into between the parties for their mutual accommodation, altering the route of

¹ *Rerick v. Kerr*, 14 S. & Rawle, (Penn.) R. 267.

² *Swartz v. Swartz*, 4 Barr, (Penn.) R. 353.

³ *Le Fevre v. Le Fevre*, 4 S. & Rawle, (Penn.) R. 241.

the watercourse ; provided the agreement has been carried into effect.

§ 325. A verbal license may terminate, and without any act of revocation on the part of the licenser ; as where a permission was given to erect a dam for a *temporary purpose* ; it was held to be terminated by a *decay of the dam*.¹ In delivering the opinion of the Court in this case, ROGERS, J., observed as follows : “In awarding a new trial, the Court think proper to lay down some principles which may be useful in another trial of the cause. It appeared in evidence, that Frederick Ritter, under whom the plaintiff claims, was in possession of the *Jew's Mill*, from 1811 till 1815. The spring he came, there was no dam ; but in the summer of that year, Drake, under whom the defendants claim, drove and put in some stakes and bushes, and made a dam, as the witness says, like a fish-dam. It was swept away in a short time by a fresh. Drake then asked Ritter if he would help him to make a little dam, with which Ritter complied, by assisting him to get logs, and to lay them across the creek, to cut bushes and to lay them on the logs, and then Drake hauled stone on the top of the bushes. Ritter cannot say that the dam was ever finished, but believes that it stood that winter, but was gone the next. He says he did not take particular notice how high it came, for he did not care much about it, as it did not injure him, and that he never gave Drake any right to overflow the ford. He was sure the dam he made would not stand long. That he gave Drake no grant of the right, and that there was a saw-mill on the property at the

¹ *Hepburn v. McDowell*, 17 S. & Rawle, (Penn.) R. 383.

time. This permission or license has been attempted to be magnified into a grant of a right to erect a dam of a permanent nature, for a grist-mill, of the same height, which it is alleged was twenty inches. As a license for the erection of the present dam, the assistance or permission to Drake, as disclosed by the evidence, is entitled to no weight. It was a license for a temporary purpose, (which appears to have been answered,) which would have excused Drake from a suit by Ritter, but does not amount to a grant for any other purpose than was in the immediate contemplation of the parties. It is manifest it was neighborly kindness on the part of Ritter, without the slightest view of granting a right to a permanent use of the water. To make the most of it, it was a license during the continuance of the dam, and as soon as the dam was swept away, the license ceased to exist. To justify a new erection, even for a temporary purpose, a new grant or permission was necessary. I mean, if the effect was to swell the water on the land of Ritter. In *Rerick v. Kerr*, the distinction is taken between the cases, where the object to be accomplished is temporary, and where it is permanent. Permission to use water for a mill, or any thing else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed, or fall into a state of dilapidation. But it is otherwise where the object to be accomplished is temporary. And the Court then instance a saw-mill, as a temporary erection. No person can avoid seeing, that it was not within the comprehension of either of the parties, that Ritter had made a grant to Drake of a right to the permanent use of the water. It was a temporary use that was intended to be conferred, and

for a particular purpose, and it would be the height of injustice to extend that to any other purpose than that intended by them."

5. *The Doctrine of Estoppel as applied to Parol Licenses.*

§ 326. In *Corning v. Gould*,¹ an important case, which has been before cited upon another point,² the Court ask, Why may there not another doctrine, the doctrine of *estoppel*, *estoppel in pais*, come in? "The general rule," say they, "being established, that such rights" (easements or servitudes) "may be extinguished by the act of the party beneficially interested, done upon the land where the servitude is exercisable, — *no writing* being necessary, but the case being clear of the *statute of frauds*, — we are then at liberty, and it is quite material to consider whether the party purchasing the land, apparently discharged of the servitude, has not the right, the matter not being explained to him at the time, to insist on the one to whom the servitude is due to such apparent discharge, even though he might have intended a mere *suspension*."

§ 327. Estoppel is a rule of law operating as an *impediment*, by which rights or titles may be bound, although no property or interest actually passes. It was formerly considered, that there could be no estoppel where any interest did pass, but that doctrine has been lately disallowed.³ There is, says GIBSON, C. J., such a thing as an *estoppel in pais*; but it is always

¹ *Corning v. Gould*, 16 Wend. (N. Y.) R. 531. And see Ante, § 323.

² Ante, § 250.

³ *Doe ex dem. Christmas v. Oliver*, 10 B. & Cress. R. 181.

by an act done, such as partition, entry, livery, acceptance of rent or of an estate.¹ Contrary to the feeling which seems to have pervaded the Courts, with regard to other classes of estoppel, their inclination appears to have been to extend the list of estoppels *in pais*, especially in mercantile transactions, where men are obliged to trust much *to appearances*.² The English Courts have been for some time favorable to the doctrine of estoppel hostile to its technicality; but, at the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when they were made, and by which no one was ever deceived, or induced to alter his position. Such estoppels are still, as formerly, in England, considered as *odious*.³ The recent decisions of Courts, in this country as well as in England, have given a more liberal extension to the doctrine of estoppels than that which formerly existed; and to have established that in all cases, where an act is done, or a statement made by a party, the truth or efficacy of which it would be a *fraud* on his part to controvert or impair, there the character of an estoppel

¹ Field's Estate (Case of,) 2 Rawle, (Penn.) R. 351.

² 2 Smith, Lead. Ca. (Amer.) Ed. 511. "Estoppels have been sometimes said to be *odious*, and it has been affirmed, that there is no such thing as an equitable estoppel. But the doctrine of election, which prevents a party from claiming in repugnant rights, and which has been so advantageously introduced into Courts of Equity, is manifestly an extension of the principle. In Courts of Law, they are for the most part reconcilable to the purest morality, and when they produce neither hardship nor injustice, they merit indulgence, if not favor. The conclusiveness of judgments, which conduces so essentially to peace and repose, has no other foundation." Per Gibson, C. J., in *Martin v. Ives*, 17 S. & Rawle, (Penn.) R. 364.

³ Smith, Lead. Ca. *ub. sup.*

shall be given to what would otherwise be mere matter of evidence; and it will, therefore, be binding on a jury, even in the presence of truth of a contrary nature.¹ The general doctrine in relation to the subject, is thus stated by Lord DENMAN: "Where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the time."² But it is not here intended to discuss at length the doctrine of the peculiar rule of pleading of which we have thus far treated, because it would be incompatible with the design of the present work to do so. We have seen, that it may (as an *impediment*) operate to the full extent of the extinguishment of an easement.³

¹ See the learned note of the American editors to 1 Smith Lead. Ca. p. 531.

² *Pickard v. Sears*, 6 Adol. & Ell. R. 469. This case was an action of trover, in which it appeared that the plaintiff, being the legal owner of the goods in question, they were seized while in the actual possession of a third party, under an execution against such third party, and sold to the defendant. It was held, that under a plea denying the plaintiff's possession, the defendant might show, that the plaintiff authorized the sale; and that a jury might infer such authority from the plaintiff consulting with the execution creditor, as to the disposal of his property, without mentioning his own claims, after he knew of the seizure and of the intention to sell. See also 9 B. & Cress. R. 586; 3 B. & Adol. R. 318, note (a.)

³ Parol or verbal admissions which have been held conclusive against the party, seem, says Mr. Greenleaf, to be those on the faith of which a Court of Justice has been led to adopt a particular course of proceeding, or on which another person has been induced to alter his condition. To these may be added a few cases of fraud and crime, and some admissions on oath. 1 Greenl. Ev. 204; and see the doctrine considered, of the general law of admissions; Ibid. Ch. XI. An estoppel *in pais* to be effectual, must be reciprocal and binding on both parties, and the acts or ad-

§ 328. As an estoppel is so called, because a man is concluded from saying any thing, even the truth, against his own act or admission, if a man knowingly, though passively, by looking on should suffer another to purchase and expend money on or about a mill-site, under an erroneous impression of his title, without making known his claim, he cannot afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience would be bound by such equitable estoppel.¹ But to estop one from asserting title by reason of his presence at the sale by another, without having made any objection, the subject-matter of the sale must be something in which his interest is direct and immediate. If there be an intermediate interest, on which his is dependent, he cannot be estopped. Thus, if a person who is entitled to have the water flow to his house, in a certain manner, by agreement permits others to take and use part of it, their presence at a sale which is inconsistent with his rights, will not estop them from having the use of the water, he not having been present.²

missions relied on, by way of estoppel, must have been intended to influence the conduct of the party setting them up; must have had the effect intended, and the denial must operate to the injury of such latter party. *Welland Canal v. Hathaway*, 8 Wend. (N. Y.) R. 480.

¹ *Wendell v. Van Rensselaer*, 1 Johns. (N. Y.) Ch. R. 353. It is, *first*, the knowledge, and *secondly*, the concealment, which estops one from setting up his title. *Buckingham v. Smith*, 10 Ohio R. 288. In a bill in equity in the Supreme Court of Massachusetts, the Court admit the principle, that where one stands by, and sees another laying out money, and making large investments upon property, to which he himself has some claim or title, and does not give notice of it, he cannot afterwards, in equity and good conscience, set up such claim or title. *Gray v. Bartlett*, 20 Pick. (Mass.) R. 193.

² *Watkins v. Peck*, 13 N. Hamp. R. (vol. 1, 2d series) 360.

§ 328 *a*. In an action of trespass for diverting water from the plaintiff's mill, the defendant, by giving evidence tending to show title to the *locus in quo* in the State, is not precluded, as by an estoppel, from proving that the water was taken in pursuance of the State, by the direction of a canal commissioner, for a supply of water for the State canal.¹

328 *b*. The fact that a defendant in an ejectment suit has taken a quitclaim deed from another, and entered into possession under it, will not estop him from questioning the title of his grantor. An estoppel exists only when there is an obligation, express or implied, that the occupant will at some time, or in some event, surrender the possession; as between landlord and tenant, or as between vendor and vendee before conveyance. There is no estoppel between grantor and grantee.²

§ 329. A and B, owners of adjoining tracts of land, erected, under a parol agreement, a mill and dam at their joint expense, the site of which was on the land of A, and the watercourse power partly on that of B. B's assignee's sold his tract as a saw-mill, with the appurtenances. It was held, that if the contract between A and B was for a term of years only, yet if the purchaser from B continued in possession after the determination of the term, and jointly with A erected a new mill on the old site, to propel which, the power on A's land was necessary, A was estopped denying the right of such purchaser to a moiety of the mill-site and of his *land* covered by the water which constituted the mill power.³

¹ Walrath v. Barton, 11 Barb. (N. Y.) Sup. Co. R. 332.

² Bigelow v. Finch, 11 Barb. (N. Y.) Sup. Co. R. 498.

³ Swartz v. Swartz, 4 Barr, (Penn.) R. 353.

CHAPTER IX.

OF INUNDATION AND BACKWATER, CAUSED BY THE USE OF
THE WATER.

1. Overflowing Land above.
2. Flooding Land below.
3. Backwater upon a Mill above.
4. Prior occupation.
5. Right to overflow or to cause Backwater, as derived from Special Grants and Reservations.
6. Prescription, or Twenty Years' Enjoyment.
7. Parol Licenses.

§ 330. THE use of a watercourse by mill-owners and other riparian proprietors, in such a manner as to inundate or overflow the lands of riparian proprietors and other land-owners above, is directly contrary to the injunction of the law,—*sic utere tuo ut alienum non lædas*, for which, by the English Law, an action will lie as for a private nuisance,¹ and for which, by the Roman Law, the *actio aquæ pluvie arcendæ* will lie.²

¹ Aldred's Case, 9 Rep. 59 ; 3 Bl. Comm. 217 ; and see Ante, § 95, 96, 97 ; Great Falls Co. v. Worster, 15 N. Hamp. R. 412.

² Compend. of Modern Civ. Law, by Mackeldy, edited by Kauffmann, in which is cited fr. 1, § 1, D. 39, 3, (Ulpianus,) "*Hæc autem actio (scil. aquæ pluvie arcendæ) locum habet in damno nondum facto, opere tamen jam facto, hoc est de eo opere, ex quo damnum timetur, totiesque locum habet, quoties manu facto opere agro aqua nocitura est, id est, cum quis manu fecit, quo aliter flueret, quam natura soleret, si forte immittendo eam aut majorem fecerit, aut citatiorem, aut vehementiorem, aut si compri-mendo redundare efficit. Quodsi natura aqua noceat, ea actione non continetur.*" § 2. Neratius scribit: *Opus, quod quis fecit, ut aquam excluderet,*

In an early English case, the plaintiff declared that the defendant *exaltavit stagnum*, by which the plaintiff's meadow was flooded, and judgment was for the plaintiff.¹ So when in a declaration in case, for that the plaintiff was seized of two acres of land in D, and J. Q. erected, &c., so high that the water overflowed the said meadow, &c.; it was adjudged for the plaintiff.² And, in case, for stopping water *incessanter decurrente* by his land, by which the land of the plaintiff was drowned and his grass rotted, GAWDY, J., said, — "If the water had run but for one year, yet if the defendant diverts it, so that it drown the plaintiff's land, the action will lie well enough."³ The law upon this subject as thus laid down, has never been called in question, and is so well settled and so obviously just, that if one tenant in common upon which a mill is situated, erects a dam below on the same water-course, upon his several estate, and thereby flows the common property to the injury of his co-tenant, the latter may maintain an action against him.⁴

§ 331. The law as above stated is so perfectly well established and understood, that in Massachusetts and some other of the States, acts have been passed giving

quæ exundate palude in agrum ejus refluere solebat, si ea palus aqua pluvia ampliatur, eaque aqua repulsa eo opere agris vicini noceat, aquæ pluviae actione cogetur tollere. — fr. 1, § 18, D. ibid.

¹ Goldb. R. 59.

² Gro.'Jac. 556.

³ Lev. R. 193.

⁴ *Odiorne v. Lyford*, 9 N. Hamp. R. 502. That an action will in all cases lie for overflowing land, as enjoined by the maxim, *sic utere tuo, &c.* *Hutchinson v. Granger*, 13 Vt. R. 386; *Bell v. McClintock*, 9 Watts, (Penn.) R. 119. If my neighbor, says Blackstone, ought to scourge a ditch, and does not, whereby my land is overflowed, this is an actionable injury. 8 Bl. Comm. 217.

to the owners of mills' the right to flow the adjoining lands, if necessary to the working of their mills, subject only to such damages as shall be ascertained by the particular process prescribed. If public policy requires, that encouragement should be given to the building of mills and manufactories, and the liability to frequent actions at Common Law will discourage the proprietors of mill-seats from building in places where they must overflow the land of others, it belongs to the legislature to interfere, and make such provision as policy, consistently with justice, may require; and until this is done the remedy given by the Common Law for injury sustained by the overflowing of land, cannot be denied.¹ Besides, where a mill-owner is authorized by statute to flow the land of another by paying damages therefor, an action will lie against him at Common Law for damages caused by the flowing by means of a dam that has been connected with the mill, in case the mill-owner has abandoned the intention of again using the dam and water as a mill power.² If the nature and extent of the injury alleged, in an action for overflowing land, are specially described in the declaration, the plaintiff is entitled to recover nominal damages, should he fail to prove the particular injury complained of, or indeed any other actual injury.³

§ 331 *a*. An illegal flowing of land may be caused by the acts of a railroad company in the mode of constructing their road. A railroad was constructed

¹ *Johns v. Stevens*, 3 Vt. R. 308.

² *Hodges v. Hodges*, 5 Met. (Mass.) R. 205.

³ *Pastorius v. Fisher*, 1 Rawle. (Penn.) R. 27; and see *Ante*, § 135.

across certain lands adjoining the river Dun, over which the flood waters of that river used to spread themselves. These low lands were separated from the plaintiff's lands by a bank, constructed under certain drainage acts, which protected the plaintiff's lands from floods. By the construction of the road, without sufficient openings, the flood waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. There was no express clause in their act obliging the company to make openings for flood waters in that district, but there was a general provision that they should make openings when the road crossed any public drains, embankments, or works in any drainage district. It was held, that although the company might not be compelled by a *mandamus* to make openings for the flood waters in that district, yet that an action would lie against the company for the injury to the plaintiff's lands.¹

§ 332. A riparian owner whose lands are directly inundated by the acts of his neighbor, can, not only by the Common Law, recover adequate damages, but he is allowed, by the same authority, to defend his land against encroachments; and if any consequences detrimental to the wrongdoer result from this course, they afford no legal ground of complaint.²

¹ *Lawrence v. Great Northern Railway Co.* 2 Law Journ. R. (N. S.) 293, and S. C. in 4 Eng. Law and Eq. R. 265.

² *Merritt v. Parker, Coxe*, (N. J.) R. 460. If a party unlawfully turns a watercourse upon the land of an adjoining proprietor, no right to the water is thereby conferred, and the wrong-doer may divert the water at any time within twenty years. *Shields v. Arnat*, 3 Green, (N. J.) Ch. R. 234.

§ 333. A riparian proprietor may in fact legally erect any work in order to prevent his lands being overflowed by any change of the natural state of the river, and to prevent the old course of the river from being altered.¹ The case of *Farquharson v. Farquharson*, in Scotland, was a case of this sort.² That was the case of the land of two proprietors on the river Cluny, on opposite banks of the river, which runs northward, and falls into the river Dee. Auchindyne grounds were on the left bank; Invercauld grounds on the right. Invercauld on his grounds had erected a mound, and the question was as between him and Auchindyne, whether he was entitled to erect that mound; and it was decided that he was. But the circumstances were of this description:—The river had been continually going to the eastward. It had in one instance actually departed from its original course, and taken a new direction, placing a part of Invercauld grounds on Auchindyne side, and was obviously repeating, or attempting to repeat, the same operation, by a new encroachment on Auchindyne grounds. The mound erected, therefore, was not to have the effect of altering the old course of the river, but it was to have the effect of preventing the old course of the river from being altered; and that, it is obvious, is a most material distinction in cases of this kind. But, independently of this, there was evidence to show, that at least a considerable part of the bank was built on old foundations. There was further

¹ See *Rex v. Trafford*, 1 B. & Adol. R. 874, and in the Exch'r, 8 Bing. R. 204.

² *Farquharson v. Farquharson*, cited in 3 Bligh, Parl. R. (N. S.) 421, . 422.

evidence of this description, which, with respect to cases like the present, is of the most important character, that, according to the custom of that part of the country, proprietors on the opposite sides of the rivers had embanked against each other; and in this particular case it was proved, that Auchindyne had himself embanked on his side of the river, for the purpose of preventing the overflow of the water on his side, so as to throw it on Invercauld; and it was proved also, as the last circumstance, that the destruction of the grounds of Invercauld would have followed, if these works had not been allowed, and that the most trifling damage in point of amount was occasioned to the proprietor on the other side.

§ 334. But a riparian proprietor for his greater convenience and benefit has no right to build any thing which, in times of *ordinary* flood, will throw the water on the grounds of another proprietor so as to overflow and injure them. This was so expressly adjudged in the case of an appeal to the British House of Lords from the Court of Session in Scotland.¹ The law on this subject, as considered by the Lord Chancellor in giving judgment in this case, is as follows: "But let us see what is said on this subject by the institutional writers on the Law of Scotland. Erskine, in his Institutes, is distinct, as it appears to me, and precise upon the subject. He says:—'When a river threatens an alteration of the present channel, by which damage may arise to the proprietor of the adjacent or opposite ground, it is lawful for him to build a bulwark *ripæ muniendæ causa*, to prevent the loss of ground that is

¹ See *Rex v. Trafford*, *ub. sup.*

threatened by that encroachment;’ so that the proprietor whose lands are threatened to be washed away, may, for the purpose of protecting his own property in a case of that description, raise a bank for his own security; but this bulwark must be so executed, as to prejudice neither the navigation nor the grounds on the opposite side of the river; and as a guard against these consequences, the builder, before he began his work, was obliged by the Roman law to give security. Nothing, therefore, can be more distinct and precise, than the language of Erskine in his Institutes, with respect to this particular case. He says:—‘You may protect your own property from destruction;’ so you may by the law of England; but he says in distinct terms, ‘Though the river threatens to change its channel, and to encroach upon your land, you cannot protect yourself to the prejudice of the opposite proprietor.’ Lord Stair in his Institutes, though not so clear and precise, yet in general terms confirms that which is laid down by Erskine in his Institutes. The language of the Roman law, according to the passage cited in the case, confirms the same doctrine. It is there said, (39 Dig. t. 3, 1, 1,) ‘*Opus quod quis fecit ut aquam excluderet, quæ exundante palude in agrum ejus refluere solet, si ea palus aqua pluvia ampliatur, eaque aqua repulsa eo opere agris vicini noceat, aquæ pluviae actione cogetur tollere;*’ and, according to a passage quoted in the printed papers, Voet repeats the same doctrine. In the Digest you will find another passage to the same effect, under the title ‘De Aqua,’ (lib. 39, tit. iii.) ‘*Hæc autem actio locum habet in damno nondum facto, opere tamen jam facto; hoc est de eo opere, ex quo damnum timetur, totiensque locum habet, quotiens manufacto opere agro aqua nocitura est; id est cum quis manu fecerit quo*

aliter fluere, quam natura soleret; si forte immutando eam aut majorem fecerit aut citatiorem aut vehementiorem; aut si comprimendo redundare effecit: quod si natura aqua noceret, ea actione non continentur. It appears to me, that that passage (and there are others to the same effect in the Digest) confirms the opinion laid down by Erskine in his Institutes, with respect to the law of Scotland, in confirmation of which, he refers to the Roman Law. It is true that passages may be found in the Digest, appearing to have a contrary tendency, but I think they may be all reconciled; or, consider the subject in this light, that these passages to which I am now alluding, have reference to accidental and extraordinary casualties, from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbors, for the sake of self-preservation, guard themselves against the consequence; — perhaps in this way, the different passages in the Digest may be reconciled.”

2. Flooding Land below.

§ 335. The maxim, *sic utere tuo ut alienum non lædas*, dictates, that it is equally actionable for an occupier of a mill vehemently to discharge a superabundance of water below him, as it is to overflow land above, or by the side of him. The rule of the Civil Law is very rigid in this particular;¹ and according to Pothier, the

¹ Kauff. Mack. 305, n. (b.) Nec illud quæremus: unde oriatur? nam et si publica oriens vel lex loco sacro per fundum vicini descendat, isque opere facto in meum fundum eam avertat, aquæ pluvie arcendæ teneri eum, Labeo ait. — fr. 1, § 22, D. 39, 3. Sed si vicinus opus tollat et sublato eo aqua naturaliter ad inferiorem, agrum parveniens noceat, Labeo existimat

supra-riparian proprietor must not raise the water by means of dams so as to make it fall with more abundance and rapidity than it would naturally do, to the injury of the proprietor below.¹ By the Common Law, if a mill occupier shuts down his gate, and detains the water, and afterwards, by permitting it to discharge itself in unreasonable quantity to the annoyance of a mill in the lower part of the stream, he is liable to an action.² In an action against the corporation of the

aquæ pluvizæ arcendæ agi non posse ; semper enim hanc esse servitutem inferiorum prædiorum, ut natura profluentem aquam excipiant. Plane si propter id opus sublatum vehementior aqua profluat vel corrivetur, aquæ pluvizæ arcendæ actione agi posse, etiam Labeo confitetur. § 23. Denique ait : conditionibus agrorum quasdam leges esse dictas, ut, in quibus agris magna sint flumina, liceat mihi scilicet in agro tuo aggeres vel fossas habere : si tamen lex non sit agro dicta, agri naturam esse servandam, et semper inferiorem superiori servire, atque hoc incommodum naturaliter pati inferiorem agrum a superiore, compensare que debere cum alio commodo ; sicut enim omnis pinguitudo terræ ad eum decurrat, ita etiam aquæ incommodum ad eum defluere ; si tamen lex agri non inveniatur, vetustatem vicem legis tenere. Sane enim et in servitutibus hoc idem sequimur, ut, ubi servitus non invenitur imposita, qui diu usus est servitute neque vi, neque precario, neque clam habuisse longa consuetudine velut jure impositum servitutem videatur. Non ergo cogemus vicinum aggeres munire, sed nos in ejus agro muniemus, eritque ista quasi servitus. In quam rem utilem actionem habemus vel interdictum.” —Schneider in the Z. fr. Civil. R. u. Proc. vol. 5, p. 325.

¹ Pothier, *Traité du Contrat de Société*, second App. No. 236.

² *Merritt v. Brinckerhoff*, 17 Johns. (N. Y.) R. 306. In *Shaw v. Cumiskey*, 7 Pick. (Mass.) R. 76, the defendant dug a ditch whereby water was conducted from his brewery to an old clay pit in the plaintiff's back yard ; and it was held, that an action on the case for a nuisance lay against the defendant. A supra-riparian proprietor cannot legally increase the quantity of water which flows below him, without consent. *Merritt v. Parker, Coxe*, (N. J.) R. 460. In Delaware it is provided by statute, that any person who shall wilfully discharge from any mill-dam an unusual quantity of water, or who may do the same accidentally ; it shall be his duty, as soon as the nature of the case will admit, to give notice of the wilful or accidental discharge of such water, to the owner or possessor of any mill which may be situate next below him ; and for omission to do so,

City of New York for injuries occasioned by the negligent and unskilful construction of a dam on the Croton river, it appearing that the dam was part of the work undertaken pursuant to the act of the legislature for supplying the city with water, and that it was built by persons employed for the purpose under a contract with the water commissioners; it was held, that the commissioners, though appointed by the State, were the agents of the corporation, and that the latter were liable for the consequences to the plaintiff of the sweeping away of the dam.¹ In the case of *Barron v. The Corporation of Baltimore*, it appeared that the corporation in the exercise of their municipal powers, diverted certain streams from their natural channels, to a point near the plaintiff's wharf, or navigable water, within the harbor and city of Baltimore, to which point a large deposit of sand and earth was carried down by the streams, and injured the value of the wharf; and it was held, that a private action lay for the damage arising from this corporate act.²

§ 336. The degree of care which a party who constructs a dam across a stream of water is bound to use, is in proportion to the extent of the injury which will be likely to result to third persons, provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to great freshets, those must likewise be guarded against; and the measure of care required in such cases is that which a discreet person

the offender shall forfeit and pay *double the amount* of all damages with costs. Laws of Delaware, p. 405, 406.

¹ *Bagley v. Mayor, &c. of N. York*, 8 Hill, (N. Y.) R. 531.

² *Baron v. Corporation of Baltimore*, Am. Jurist, No. 4, p. 203.

would use if the whole risk were his own.¹ In a case where the plaintiff gave evidence that the defendant was the possessor of a saw-mill and dam above the plaintiff's works, and by means of the dam had raised a large body of water, about a mile in length, and varying in width from a few rods to half a mile; and that the dam gave way, and let down the whole body of water upon the plaintiff's works below, and which swept away and destroyed his property to a large amount; and at the time the dam gave way, there had been no unusual fall of rain; the Court held as follows:—"The defendant was subject to the maxim, *sic utere tuo ut alienum non lædas*; and to comply with this requisition of the Common Law, it was the duty of the defendant to have used *ordinary* care and diligence in making repairs to his dam; or in drawing off the water from his pond to prevent injuries to the plaintiff's furnace. If the defendant did not use this care and diligence, he was guilty of negligence, and liable for consequential damages; but he was not liable for *inevitable accident*." ²

§ 337. It has been said, that if a man's ground is surrounded by water by natural causes, he is allowed to make a trench for the purpose of conveying the water downward upon the land of his neighbor; for the reason that water is descendible by the laws of nature.³ In such case, however, the law without doubt would require the exercise of proper caution, and would reprobate any injurious consequences which, with pru-

¹ Per Chan. Walworth, in *Mayor, &c. of New York v. Bailey*, (in Error,) 5 Denio, (N. Y.) R. 433.

² *Lapham v. Curtis*, 5 Vt. R. 371.

³ *Callis on Sewers*, 186, who cites 12 Hen. VIII.

dence and care, might be prevented.¹ It has been held by the Supreme Court of Pennsylvania, that where several persons unite in the purchase of a piece of ground, and divide the same into smaller lots, upon each of which a house is built, and then partition is made between them, each must so regulate and grade his own lot, as that the water which falls or accumulates upon it shall not run upon the lot of his neighbor.²

§ 338. *Williams v. Gale*, in the Court of Appeals of Maryland,³ was an action on the case, brought by the appellee (the plaintiff below) against the appellant, (the defendant below,) for making and erecting a dam and bank of earth in and across an ancient stream of water which ran through the lands of the plaintiff and the defendant, so as to overflow and cover with water the land of the plaintiff. The defendant, at the trial, moved the Court to direct the jury, that although it should appear to the jury, from the evidence, that there was a natural watercourse running through the plaintiff's land, and through the defendant's land below the land of the plaintiff, yet if it should appear to the jury, from the evidence, that the plaintiff, by cutting ditches on his own land, contiguous to the

¹ The owner of a mill has an easement in the land below, for the free passage of the water from the mill, in the natural channel of the stream, accompanied with a right to enter upon the land for the purpose of clearing out the stream, and removing obstructions to the free flow of the water. *Prescott v. Williams*, 5 Met. (Mass.) R. 429. A law may be passed providing for cases in which swamps, bogs, or wet land should be drained by ditches and embankments on the land of each owner, for the general benefit. *The Wharf Case*, 3 Bland, (Md.) Ch. R. 442.

² *Bentz v. Armstrong*, 8 Watts & S. (Penn.) R. 40.

³ *Williams v. Gale*, 3 H. & Johns. (Md.) R. 231.

watercourse, and making banks, and clearing and cultivating the land, in the occupation and use of his land, increased the quantity of water which flowed down the watercourse, in a greater quantity than would have naturally flowed down the same watercourse, to the injury of the defendant's land, by overflowing the defendant's land adjoining the natural course; and that the plaintiff, by the said means, increased the velocity of the current which ran down the watercourse, to the injury of the defendant's land, that then, and in that case, the defendant had a right to erect any necessary bank on and within the limits of his own land, and across the watercourse, to obstruct the watercourse, and to prevent such injury, and for the enjoyment and benefit of his own land, although the plaintiff's land should be damaged thereby; and that, under such circumstances, the plaintiff could not support his action, but that the jury should find for the defendant. This opinion and direction the Court refused to give to the jury, but they were of opinion, and so directed the jury, that, under the above circumstances, the defendant had no right to erect the bank to obstruct the water. The defendant excepted; and the verdict and judgment being for the plaintiff, the judgment was affirmed.

§ 339. In *Cooper v. Barber*,¹ the defendant had for many years past penned back a stream for the purposes of irrigation, the consequence of which was,

¹ *Cooper v. Barber*, 3 Taunt. R. 99. The objection to such a right as the one in question in this case being acquired, by user, is that such underground filtrations may be unknown to the owner of the land subjected to them, until he commences building upon it. It has already been shown, that a presumption of right by virtue of user ought to be furnished by any enjoyment which is had either *vi, clam, or precurio*. See Ante, § 100 - 115.

that the water *percolated* through the neighboring soil.¹ The Court appear to have been of opinion, that no right to cause such *percolation* was acquired by user, and that the adjoining owner, on receiving injury from it upon erecting a house, might bring an action for it.²

3. *Backwater upon a Mill above.*

§ 340. The maxim, *sic utere tuo, &c.*, applies as well to setting back the water of a watercourse above the owner's land in the natural channel of the stream, as it does to an actual overflow of land; and indeed the consequences of setting back the water upon a mill-wheel above, are in most cases more injurious than flowing the land in the absence of any mill upon it. According to the doctrine we have laid down, in treating of the general property in a natural watercourse, every riparian proprietor, on either bank, is fully entitled to the benefit of the water, as it subsists in its natural state. It follows then, that no single proprietor, without consent, has a right to make use of the flow, in such a manner as will be to the prejudice of

¹ See Ante, § 109 – 115.

² “If a man hath a seu, that is to say a spout, above his house, by which the water used to fall from his house, and another levies a house paramount the spout, so that the water cannot fall as it was wont, but falls upon the walls of the house, by which the timber of the house perishes, this is a nuisance.” Vin. Abr. “Nuisance,” G. 5, citing 18 Ed. 3, 22 b. The easements “that a man shall receive upon his house or land, the flumen or stillicidium of his neighbor, are directly recognized by the Civil Law.” Gale & What. on Easem. 121; and see Ante, § 143. The difference says Vinnius, between the flumen and the stillicidium is this,—the latter is the rain falling from the roof by drops; the flumen is when it is poured forth in a continuous stream from the lower part of the building. See Gale & What. on Easem., *ub. sup.*

any other; and that he has no more power to apply it to a purpose which occasions a return of the water on the land *above*, than he has to cause a diminution of the quantity *below*. He cannot alter the level of the water, either where it *enters*, or where it *leaves* his property.¹ In the language of the Vice-Chancellor, in *Wright v. Howard*,² — “Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would descend to the proprietor below, nor *throw the water back* upon the proprietors above. Every proprietor who claims either to throw the water back above, or diminishes the quantity which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years.”³

§ 341. It therefore follows, that when a watercourse is raised so high, that the water is prevented from escaping from a mill above, whereby the motion of its

¹ See Ante, § 92 – 97.

² *Wright v. Howard*, 1 Sim. & Stu. Ch. R. 203.

³ *Detweller v. Groff*, 10 Barr. (Penn.) R. 376; *Munn v. Wilkinson*, 2 Sumn. (Cir. Co. R.) 273; *Moffett v. Brewer*, 1 Greene, (Iowa) R. 348. Under a railway act which gave power to divert rivers, watercourses, &c., a company had raised the level of a brook into which the sough of a coal-mine had been accustomed to empty itself, and thereby caused the water of the brook to flow into the sough, and inundate and stop the coal works: It was held, upon the application for a *mandamus* for a jury to ascertain and compensate the owner for the injury done to his works, that it was a question for the jury, and that the owner's alleging that he was injured by the altering of the level of the brook, was sufficient to entitle him to a *mandamus*; and that if damage be done partly under the powers of a statute and partly not, a *mandamus* and not an action at law is the proper remedy for such lawful acts. *Regina v. North Midland Railway Co.* Cases relating to Railways, Vol. II. Part I. p. 1.

wheels is impeded, it is an actionable injury. In *Saunders v. Newman*,¹ BAYLEY, J., says, — “If a person stops the current of a stream, which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action.” “Any impediment,” say the Supreme Court of Pennsylvania, “in the stream caused by the defendant’s dam, by which the plaintiff’s mill is stopped from grinding, in any state of the water, or made to grind slower, or worse than it otherwise would, is an injury for which the plaintiff would be entitled to damages.”² In a case, too, in New Hampshire, the Court say, — “In general every man has a right to the use of the water flowing in a stream through his land; and if any one divert the water from its natural channel, or *throw it back*, so as to deprive him of the use of it, the law will give him redress.”³ “There can be no difference,” say the Supreme Court of Massachusetts, “whether the damage to the owner of a mill arise from the water above being diverted from his mill, or from the water below being stopped so as to flow back and thereby prevent the mill from grinding.”⁴ Again, in Massachusetts, where the defendant was owner of an existing mill-dam, and the plaintiff rightfully erected a mill-dam above it, on the same stream, it was held, that the defendant had no right to increase the height of his dam to a level with the plaintiff’s wheel, and thereby obstruct the wheel by backwater, PARKER, C. J., observing, — “There is no such right as

¹ *Saunders v. Newman*, 1 B. & Ald. R. 258.

² *Butz v. Ihrie*, 1 Rawle, (Penn.) R. 218; and see also *Stiles v. Hooker*, 7 Cow. (N. Y.) R. 266.

³ *Gilman v. Tilton*, 5 N. Hamp. R. 232.

⁴ *Hodges v. Raymond*, 9 Mass. R. 316.

the defendants claim, to raise by flash-boards the water to a level of the plaintiff's wheel. Both parties had a right to use their water privilege. The defendants having first erected their dam to an adequate height for the common state of the water, the plaintiff had a right to work his mill without interruption by any additional dam of the defendants."¹

§ 342. The rule, that a riparian proprietor cannot alter the level of the water above the point where the water enters his land, applies whether the supra-riparian proprietor has a mill already erected to be affected by backwater, or not. The Supreme Court of Illinois, in giving judgment in a case in which the plaintiff sought to recover damages for an alleged injury occasioned by the erection of a dam by the defendant, and the consequent setting back the water upon the plaintiff's mill site, and *preventing him from proceeding to erect a mill*, said: "Every man has a right to construct a mill-dam on his own land; but in so doing he must be cautious that he does no injury to another. He cannot interfere with his neighbor's rights and privileges, or set back the water of a stream one foot upon his land, without rendering himself liable to damages commensurate with the injury sustained, unless he has so long enjoyed his privilege as to confer upon him a prescriptive right."²

¹ Sumner v. Tileston, 7 Pick. (Mass.) R. 198. And see to the same effect, Ripka v. Sergeant, 7 Watts & S. (Penn.) R. 9.

² Hill v. Ward, 2 Gil. (Ill.) R. 285. In the Supreme Court of Indiana there was a case in which an action was brought for obstructing a water-course by a fish-dam, to the injury of the plaintiff's mill. The defendants asked the following instruction which the Court refused to give: that "If the fish-dam is built three fourths of a mile below the mill, and the jury believe from the evidence that the said dam is only one foot high, and that the fall of the water from the surface thereof below the plaintiff's mill

§ 343. If one person erects a dam upon a river where the public have an easement for navigable purposes and for the passage of lumber, and the dam proves an obstruction to transportation, another riparian proprietor below him cannot justify the erection of a dam, and thereby cause the water to flow over the dam first erected, on the ground that it is a public nuisance.¹

§ 343 *a.* The owner of a mill and mill ponds, and of land bordering on a stream, conveyed to A the upper part of said land, with "a privilege to the grantee to dig a ditch," from a certain point, "large and deep enough to convey all the water into the river, without overflowing the meadow, where it will do the grantor's land the least damage." The grantor afterwards conveyed the lower part of the land to B, who erected a mill-dam thereon, and thereby flowed the water back into the ditch which A had dug, in pursuance of his grant; and A brought an action against B to recover damages for such flowing. It was held, that B could not defend by showing that he, with the knowledge of A, and without objection from him, erected said dam, and continued it for several years before A dug his ditch as to be affected thereby, and that the damage to A was occasioned by the sinking of his ditch to a level below that at which it was when B's was erected. When the grantor owned the entire privilege, it was

wheel, to the surface thereof on the top of the fish-dam is nearly two feet, the jury may find for the defendants." It was held, that it was the duty of the Court to instruct the jury as to the law, and inform them as to the legal sequence resulting from given facts; but the Court was not bound to tell the jury that one fact necessarily results as a consequence of another fact. *Case v. Webber*, 2 Cart. (Ind.) R. 108.

¹ *Odiorne v. Lyford*, 9 N. Hamp. R. 502; and see *Hart v. Mayor of Albany*, 9 Wend. (N. Y.) R. 571.

competent for him to make stipulations with the purchaser of the upper privilege, creating rights in that privilege, and imposing servitudes upon the lower, that would be binding upon the subsequent purchasers of the lower privilege.¹

§ 344. In *M'Almont v. Whittaker*, in Pennsylvania,² the plaintiff, it appeared, was the owner of a tract of land, mill, and water power on a watercourse, and that the defendant was the owner of another tract of land, mill, and water power below the plaintiff; and the plaintiff complained of being injured by the defendant's dam which backed the water upon the plaintiff. It was held, in conformity to the doctrine above laid down, that the water to which a riparian owner is entitled consists of the difference of level between the surface where the stream, in its natural state, first touches his land, and the surface where it leaves it. But the views of Mr. J. HUSTON, in giving his judgment in this case, are worthy of attention. He says: "It may be admitted, generally, a man has a right to use all the fall in a stream of water, from the place where it enters his land to the spot where it leaves it; nay more, that if at the first erection of his machinery he did not use it all, he may change his site within his land, or raise his dam to flow it back to his line, or deepen his tail-race as low as he can, so as to deliver the water into its *natural* channel at his lower line. But he cannot raise his dam so as to throw the water back on the man above him; nor can he dig his tail-race through the land of the owner below, so as to deliver the water into its natural channel at a point where that channel is

¹ *Whitney v. Eames*, 11 Met. (Mass.) R. 517.

² *M'Almont v. Whitaker*, 3 Rawle, (Penn.) R. 84.

lower than at his own line; nor can he go into the channel of the creek in the farm below, and deepen that channel so as to make the bottom of the creek lower at his own lower line, than it was in a state of nature. He has no better right to blow rocks, or dig out gravel, or clay, in the channel of a creek below his own line, than he has to go into the fields below and dig a race; in either case he commits a trespass on the man owning below. If he could do either, he could take from the owner below all that person's fall, and add it to the tract above." . . . "Every man who has seen a stream of water, knows that its bottom is not a regular inclined plane. If it were, the depth of the current would be equal; it is often very far from it; for many yards we find it almost a stagnant pool, and several feet deep; immediately below this we find a ledge of rock or of slate, or of hard pan, over which the water flows only a few inches in depth, and flows rapidly, and exhibits a *ripple* of more or less length, or a succession of ripples. Now if you dig away the hard pan or gravel, or blow out the rocks the whole length of these ripples to the depth of a foot or two, you change the pool above, and its surface is sunk a foot or two. Suppose the line of the tract above crossed the creek over this pool; by taking down the bottom of the creek below, the owner of the land above *can* then lower the surface of the water on the tract above — *can* do so. But can he do it legally? Certainly he cannot. Suppose in a state of nature there was a four feet fall in the space of one hundred yards in the land below; if M'Almont could dig out this fall, so as to make it level for the whole of the hundred yards, he would have four feet fall at his own lower line, and by sinking his tail-race up to his wheel, could sink his wheel four feet, and

make four feet more addition to his head ; but if the man below cannot dam back on this new wheel, he has taken four feet of water power from the man below, and that he has no right to do. The principle then is, that he may use all the fall from his own upper fall to his own lower line, but he cannot add to that by sinking the bed of the creek on the land below."

§ 345. A very common error has been thought to prevail as to the flowing back of the water of a stream by means of dams or other obstructions, and complainants fall into that error when they allege that they cannot flow back the water farther than a certain cut, because they observe a current through the cut more rapid than the other parts of the stream. And those complained against fall into the same error, when they allege, that the complainants never flowed back to their mill, because there is a fall of some inches in the stream from a certain point up to the defendants' mills. The intervention of a ripple or rapid current in a watercourse, is no evidence that the water above that ripple or current is not affected by a dam or obstruction below. And if the width of a pond were diminished one half for any distance, the water would flow through that part of the pond, while the mills were in operation, with double the velocity that it would flow through the other parts, and thereby create a current or ripple ; for it may readily be perceived, that if a dam were removed from below, the water would of course sink, and thereby increase the rapidity of the current through the narrow part of the stream, and thereby permit the water above to escape more rapidly.¹ In a case in the Court of Chancery of New

¹ *Hulme v. Shreve*, 3 Green, (N. J.) Ch. R. 116. And see *Case v. Weber*, *ante*, § 342, note.

Jersey, it was asserted by the defendants in their answer, that "the backwater of the defendants' mill is created by the narrowness of the creek, and the quantity of water flowing down the same, and not by the complainants' dam, for in the fall of the year 1831, there was a fall in the said stream from the lower point of the neck of land called 'Warner's meadow,' up to the defendant's mills, of from six to eight inches." Here is an admission of backwater, but it was charged to the *narrowness of the stream*, and not to the dam; and the allegation that the backwater was not occasioned by the dam, was evidently a conclusion drawn from the fact, that there were six or eight inches of water between the complainants' mills and the lower part of the neck of land called "Warner's meadow." But the Chancellor said:—"This conclusion is evidently erroneous, for by inspecting the measurements of the depths of the stream or pond, it will be found that from the mills of the defendants down to 'Warner's meadow,' the average depth is about four feet three inches, and that depth increases gradually from that point down to the dams of the complainants, where the average depth is more than six feet; so that there is a gradual fall in the stream from the one mill to the other, and it cannot be doubted, that if the complainants' dam were removed entirely, the water would sink at the lower part of 'Warner's meadow,' probably to one half its present depth, and thereby the water from above would escape more rapidly, and of course relieve the wheels of the defendants in some measure from their backwater. But the witnesses who have testified on this subject all agree that there is, and always has been backwater at the mills of the defendants; and the engineer puts the matter beyond con-

troversy, for he says that he has levelled the stream, and finds the complainants' full head about eight inches higher than the sheeting of the wheels of the defendants' mills; and whenever the parties shall make the experiment, by stopping both mills and letting the water find its level in the pond of the complainants, they will find that the water will stand in the sheeting of the defendants' mills nearly a foot deep."¹

§ 346. The decision in *McDonald v. Bacon*, in Illinois,² was on the ground of the exception to the general principle, that an award to be obligatory on the parties, must decide all the matters contained in submission;³ the exception being, that where the submission is of several distinct subjects, an award determining some of them only will be good, if it appear that those not decided were withdrawn from the consideration of the arbitrators, or that the parties failed to submit the evidence concerning them. The main questions submitted for the decision of the arbitrators, were, whether B.'s mill-dam, by causing backwater, obstructed the operations of M.'s mill, and, if so, what amount of damages M. had sustained, and how much the dam should be lowered. The Court, in giving judgment, said:—"The only question which the Court is called upon to decide, is, whether that part of the award which relates to the lowering of the dam, is sufficiently certain. By the terms of the submission, the arbitrators were required to ascertain and determine, upon actual examination, how much the dam should be lowered, to remove the injury com-

¹ *Hulme v. Shreve*, 3 Green, (N. J.) Ch. R. 116.

² *McDonald v. Bacon*, 3 Scam. (Ill.) R. 432.

³ See *Ante*, § 279, *et seq.*

plained of. They award that the dam shall be taken down, so that the quantity or head of water above it, shall be reduced eleven inches lower than it was on a particular day. The injury complained of arose from the backwater occasioned by the dam at the lower mill. The remedy agreed on by the parties, was the lowering of the dam, so that the backwater should cease to interfere with, and obstruct the operations of, the upper mill. It is but reasonable, therefore, to apply the reduction in the depth of water, to that part of the dam nearest the upper mill. The duty of the arbitrators seems clear and positive. They were to examine the premises, and ascertain by experiment and otherwise, in the first place, how much the depth of the water at the upper mill should be lessened, to free it from the obstruction; and then determine what reduction in the height of the dam would produce the result desired. It was useless to determine the first proposition, unless they at the same time decided the other. They ascertain the cause and extent of the injury, but fail to provide a certain and definite remedy. The principal question, *to what extent the dam is to be lowered*, remains undetermined."

§ 347. In a very modern case in England, Lord TENTERDEN, C. J., observed, — "It has been long established, that the *ordinary* course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another;" and he then says, that "unless a sound distinction can be made between the ordinary course of water flowing in a bounded channel at *all usual seasons*, and the *extraordinary* course which its superabundant quantity has been accustomed to take at particular seasons, the erection and con-

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tinuance of these fenders cannot be justified.”¹ But it is clearly agreeable to legal principles, that a riparian proprietor may erect a dam without being held liable for consequences which are remote and unforeseen. The legal maxim is *causa propinqua non remota, spectatur*; and a departure from this maxim would open a field for litigation, which might unexpectedly bring ruin upon persons engaged in lawful pursuits.² As damage from floods may be increased by almost any obstruction whatever, it is inseparable from even a reasonable use of the water in a way to produce the greatest benefit; and were it otherwise, the whole power created by the descent of the stream within the limits of each, could not be used by any of them, as a considerable margin would have to be left by each to prevent his dam from swelling the water back upon his neighbor in times of flood. It is better for all, that the whole power of the stream should be turned to account, than the particular damage, on extraordinary occasions, should be prevented by sacrificing part of it.³

§ 348. In an action brought to recover damages for an injury done to the plaintiff's bridge by a head of water raised, as was alleged, by the defendants' dam, the jury were instructed, that if the damage was occasioned by *great rains*, or by the *violence of the wind*, the defendants were not liable, if the jury were satisfied that the head of water, raised by the dam, was not raised high enough to flow the plaintiffs' bridge, or to do damage thereto. On a verdict being returned for

¹ *Rex v. Trafford*, 1 B. & Adol. R. 874; S. C. in error, 8 Bing. R. 204.

² *China (Town of) v. Southwick*, 3 Fairf. (Me.) R. 238.

³ Per Gibson, C. J., in *Monongahela Navigation Co. v. Coon*, 6 Barr, (Penn.) R. 383.

the defendants, and a new trial granted, WESTON, C. J., in delivering the judgment of the Court, said, — “The jury have found, that the head of water raised by the defendants’ dam, was not, at the period complained of, high enough to flow the plaintiffs’ bridge, or to do damage thereto. Its erection then was a lawful act, not in itself calculated to do any injury to the plaintiffs. Their loss was occasioned, as the jury have found, by great rains, or by the violence of the wind. If the dam had not raised the water to a certain height, the rain or the wind superadded might not have done the damage. It may have been one of a series of causes, to which the injury may be indirectly ascribed. Their connection, however, was *fortuitous*, and resulted from an *extraordinary* and unusual state of things ; neither the rain nor the wind was caused by the dam. The bridge had continued unimpaired for a series of years, while the dam was higher than it was when the bridge was carried away. Such an event, therefore, could not have been calculated upon or foreseen. It would be carrying the doctrine of liability to a most unreasonable length, to run up a succession of causes, and hold each responsible for what followed, especially where the connection was casual and unexpected, as it was here, and where that which is attempted to be charged was in itself innocent.”¹

§ 349. If, in the case of an obstruction of a public river, it appears that the injury resulting therefrom arose from causes which might have been foreseen, such as ordinary periodical freshets, or the collection of ice, he whose superstructure is the immediate cause

¹ *China (Town of) v. Southwick, ub. sup.*

of the mischief is liable for the damage. On the other hand, if the injury is occasioned by an act of Providence, which could not have been anticipated, no person can be liable.¹

4. *Prior Occupancy.*

§ 350. That it is now become the well-established doctrine, that no riparian proprietor can acquire any rights in the use of the water by mere *prior occupation*, (whatever *dicta* there may have been to the contrary,) has been demonstrated in a preceding chapter;² and that such is the law, as applicable to backwater, was ably maintained by an elaborate opinion of the Supreme Court of North Carolina.³ In *Heath v. Williams*, in Maine,⁴ the defendant, it appeared, had a clothing-mill on the watercourse in question, above the plaintiff's dam, and that when, in 1842, the parties were operating their respective mills, the plaintiff permitted the water, held by his dam, to rise so high as seriously to impede the operations of the defendant's mill. It appeared also, that the defendant frequently requested the plaintiff to let off the water, so that the back-flow should not injure him; which was not done. The defendant then notified the plaintiff, that he himself

¹ *Bell v. McClintock*, 9 Watts, (Penn.) R. 119. And see *Lehigh Bridge Co. v. Lehigh Nav. Co.* 4 Rawle, (Penn.) R. 9.

² See Ante, Chap. IV. § 130 - 136.

³ *Pugh v. Wheeler*, 2 Dev. & Bat. (N. C.) R. 50.

⁴ *Heath v. Williams*, 12 Shepl. (Me.) R. 44. Where the defendant was the owner of an existing mill-dam, and the plaintiff rightfully erected a mill above on the same stream; it was held, that the defendant had no right to increase the height of his dam to a level with the plaintiff's wheel, and thereby to obstruct the wheel by backwater. *Sumner v. Tileston*, 7 Pick. (Mass.) R. 198.

should let off the water, and though forbidden by the plaintiff, he thereupon removed planks from the plaintiff's flume, and let off the water, doing no greater damage than was necessary to remove the back-flow from his mill; and for this act he was sued in an action of trespass. The Court thought that the defendant, failing to obtain relief from the continuance of the injury by the backwater, without it, might lawfully enter upon the plaintiff's land, and remove, so far as was necessary, the obstruction he complained of; and in giving their opinion, they said, that priority of appropriation of running water conferred no exclusive right to the use of it, in the absence of grant, license, or an adverse appropriation for more than twenty years. So, on the other hand, an upper proprietor who has the first opportunity of using the water, and becomes the first occupant, is entitled to no more fall and water power than his privilege, within the limits of his land, will afford; and he cannot, by virtue of his first appropriation, obtain a greater water power by altering the bed of the stream lower down, and beyond the line of his own land.¹

§ 351. The erection of a mill and dam, with the use of the water for a period less than twenty years, by the owner of the land *on one side* of the river, does not show an appropriation of all the water in the stream to the side of the river on which the mill is built; nor does such use give the owner of the mill and of the land on that side a right, at a subsequent period, to flow the place where the dam stood, by means of

¹ *M'Almont v. Whitaker*, 3 Rawle, (Penn.) R. 84, and cited more fully *Ante*, § 344.

another dam erected at some distance below, to the injury of the owner of the land on the opposite side of the river. No occupation short of a period of twenty years can be evidence of such an adverse right.¹

§ 352. Where each of two persons having equal rights to a water privilege of sufficient power to drive but one mill, has recently erected a mill on his own land, neither acquires a priority of right, by first erecting his mill; but each has an equal right to the use of the water therefor, and neither can maintain an action founded in tort for the use of the water thus owned in common, before their rights became several by partition.²

5. *Right to overflow or to cause Backwater as derived from Special Grants and Reservations.*

§ 353. The right to overflow land above and below, or to set back the water upon an upper mill privilege may be conferred by a special grant. When thus acquired (like the right thus acquired of diverting or detaining the water) it is an incorporeal hereditament of the class of *easements*,³ the nature, creation, and extinguishment of which, and also the extent of the easement conferred, as depending upon the terms of the grant, there has before been occasion carefully to consider.⁴ So also the right in question (like the

¹ Lyford v. Odiorne, 9 N. Hamp. R. 502.

² Bailey v. Rust, 3 Shepl. (Me.) R. 440.

³ See Ante, Chap. V.

⁴ As to the nature and extent of easements, Ante, § 141-144; as to the creation of, Ante, § 168-173; as to extinguishment of, by unity of possession, Ante, § 191-200; as to extinguishment of, by parol license and acts *in pais*, Ante, § 240-253.

right of diverting water) may be excepted and reserved as an easement in a conveyance of the land.¹ It is now proposed to arrange the cases in which the rules and principles laid down in former chapters respecting the particular use of the water as it passes, derived by particular conveyances and contracts, have been applied directly to overflowing land and causing backwater.

§ 354. The following case, in relation to a right of flowing, by virtue of a grant, was adjudged in Connecticut:—Where A and B were joint tenants of a grist-mill and dam, and the land on which they were erected; the parties, in 1788, made a division in severalty, by a deed of partition, A taking one third, and B two thirds. In 1791, B erected a saw-mill on land owned by him in severalty, which was operated by water taken by the grist-mill pond by means of a trough inserted in the dam. In 1797, A and B submitted to arbitrators a controversy between them relating to the overflowing of the land of A, caused by the dam erected for the benefit of the grist-mill; whereupon it was awarded, that the dam should remain as it then was, and if it should in a common season cause the water to overflow A's land more than it did at the time of the partition, B should pay damages. By a writing indorsed on this award in 1799, A and B mutually agreed to abide by it. In 1807, B by a quitclaim deed conveyed to A all B's right and title in and to the grist-mill, together with the privileges thereto belonging. In an action subse-

¹ As to exceptions and reservations, Ante, § 173 – 191; Covenants running with the land, Ante, § 255 – 273.

quently brought by A against B for keeping up the dam, and thereby overflowing the adjoining land of A, the defence set up was a right in B to the use of the water in the manner stated in the declaration, for the purpose of working his saw-mill. It was held by the Court, that B had no such right by virtue of the documents referred to.¹

§ 355. In respect to the right to flow by virtue of an unlimited grant at the first settlement of the country, it has been decided in Connecticut, that where, under such grant, a person claiming under those who have elected to flow, has for a great length of time flowed to a certain extent, such extent will determine the extent of the grant; and the dam cannot consequently be raised any higher.² The rule is, that where an interest vests immediately by the force of the grant, *election* may be made by the heirs; and so an election coupled with an interest is descendible. But if nothing passed or vested in the grantee before his election, it should be made during the life of the parties.³ In *Vandenburg v. Van Bergen*,⁴ the defendant, under a deed for certain lands in Coxsackie (New York) Patent, with full liberty and license to erect and build a mill on any place on the river by that name, (with liberty of ground and stream of water,) claimed the right of overflowing the plaintiff's land, which was held by the grantor at the date of the defendant's deed; it was held, that though the grantee, in his

¹ *Watrous v. Watrous*, 3 Conn. R. 373.

² 1 Swift, Sys. 86.

³ Com. Dig. tit. "Election;" *Jackson v. Van Buren*, 13 Johns. (N. Y.) R. 525.

⁴ *Vandenburg v. Van Bergen*, 13 Johns. (N. Y.) R. 212.

lifetime, would have had a right to erect a mill on the river, and to have overflowed, so far as was reasonable and necessary, the land of the plaintiff adjacent to the river, which had been purchased from the defendant's grantor, subsequent to the date of his deed ; yet, not having elected to erect the mill, in his lifetime, the right became extinct at his death.¹

§ 356. Where the proprietors of a township, in order to encourage its settlement, voted to give lands and a sum of money to any persons who would build mills on one of the lots designated, and maintain them for ten years, which was done ; this was held to give no right to flow the lands of any individual proprietor holden in severalty at the time of the vote, though more than forty years had elapsed since the mills were built, without any claim of damage. It was urged, that for a series of years prior to the division and allotment of the proprietary lands, there was an understanding among all concerned, that the mill-lot should be reserved for the purpose of having mills erected thereon for general convenience ; and that, therefore, when the division was made, each owner or assignee of a lot must be considered as assenting to take his land subject to the right, in the owners or occupants of the mill-lot, to flow the adjoining lands, without any compensation. But the Court said, — "Such a construction would contradict the record ; it would be changing a vote or conveyance, absolute in its terms, into a conditional one ; it would be making a contract, instead of giving a construction to one already made. If a man's title, founded on deed or record, could be

¹ And see *Thompson v. Gregory*, 4 Johns. (N. Y.) R. 80.

varied and impaired in this manner by parol proof, or by the magic of construction, without any proof at all, titles would be exposed to a thousand dangers, and thrown into confusion. In early times, the flowing of the lands in question, as in many other cases, was little or no injury to the owner; but as the lands have become more valuable, that injury may become matter of importance; and we do not perceive why such an injury should not furnish as fair a claim for the damage which has actually been sustained, as in cases where the flowing has been occasioned by more recent erections.”¹

§ 357. In New York, it has been held, that a grant of land by the State, in which there is a mill-site, but no mill or dam, does not authorize the grantee to erect a dam thereon so as to flow adjoining lands subsequently purchased of the State by others, unless that right be expressly provided for in the grant; and it is so, although the subsequent purchaser acquires a title after the erection of the dam, under letters-patent referring to a map which represents his land as flowed to the extent and in the manner claimed.²

§ 358. By a grant of a mill, “with the appurtenances,” the dam and all privileges of flowing which are necessary to the full enjoyment of the mill and head of water will pass.³ The doctrine on this subject, as applied to the diversion and detention of the water, is applicable likewise to causing it to flow back on the land above; and it has been expressly held, that, as the grant of a mill not only carries the head of water

¹ *Stevens v. Morse*, 5 Greenl. (Me.) R. 26.

² *Colvin v. Burnet*, 2 Hill, (N. Y.) R. 620.

³ See *Ante*, § 158, *et seq.*

necessary to its enjoyment, with all the incidents and appurtenances, as far as the right existed to this extent in the grantor, if such grant cannot be beneficially enjoyed without causing the water to flow back upon other lands of the grantor, a right to do this passes to the extent to which it had been flowed before the grant; and to this extent all the parties and privies in estate under the grant are bound.¹ Even without the word appurtenances, we have seen that the rule is, that whenever a right is granted, all and any easements necessary to its beneficial enjoyment will pass.² Thus the grant of a right to build a dam, and flow the land of the grantor, carries with it, as incident to it, the right to enter and repair the dam and cleanse the pond.³

§ 359. In an action brought for overflowing land by the backwater of a mill, it appeared that A died seised of a tract of land on which there was a grist-mill then in operation; and that on a division of the land under the law of descent among the intestate's heirs, the mill was on the part allotted to B, the dam of which covered a portion of the part allotted to C. It was held, that B had a right to use the mill and dam in the same way, and to the same extent, as they had been used by A in his lifetime.⁴

§ 360. As a general rule, then, a deed of land over which a watercourse passes, will convey the right of the grantor, in respect to backwater, as it actually existed at the time of the conveyance. Tenants in

¹ *Rackley v. Sprague*, 5 Shepl. (Me.) R. 281.

² See Ante, § 157-167; *Mower v. Hutchinson*, 9 Vt. R. 242.

³ *Frailey v. Waters*, 7 Barr, (Penn.) R. 221.

⁴ *Kilgour v. Ashcom*, 5 H. & Johns. (Md.) R. 82.

common of an ancient mill and water privilege erected, below their mill, a new dam and a smaller mill, on their own land; and while they owned both mills, it was the practice, whenever the lower dam so raised the water as to obstruct the upper mill, for a workman in the upper mill to go down, over the land owned by the tenants in common, and open the waste gate of the lower dam, and thus relieve the upper mill from back-water. Afterwards, each of the tenants in common, by a separate deed, conveyed his undivided part of the upper mill, and the land near it, to W., in these terms: "A certain parcel of land" (described) "together with one undivided" (fractional) "part of the privilege of water, creek, factory, saw-mill, dwelling-houses, and other buildings, situate on the premises, and of the water-wheels, main gear, main drums, connected with the said factory and saw-mill, and of all the privileges and appurtenances thereunto belonging;" and in each deed was a covenant that "the aforegranted premises" were free from all encumbrances brought thereon by the grantor. W. conveyed the upper land and buildings, with all the privileges and appurtenances, to C., who was one of the former tenants in common. W. and D. afterwards became the owners of the lower land, dam, and mill, and W. released all his right therein to D., who abandoned the dam, and erected another, for the use of the mill, lower down the stream, and by means thereof threw back the water upon the wheel of C.'s mill, whereby its movements were obstructed. It was held, in a suit by C. against D. for the obstruction thus caused, that C. took the upper dam, mill, and privilege, as they existed, and were modified and appropriated by the lower dam, when the conveyance was made to W.; and that he

did not acquire a right to the unobstructed flow of the water from his mill. Held also, that the right to use the water below C.'s mill, as that right was modified by the appropriation previously made for the lower mill, was not an encumbrance on the upper mill and privilege, within the meaning of the covenant made against encumbrances by W.'s grantors, but was a parcel of the lower estate. Held also, that D., by removing his dam lower down the stream, exercised his rights justly, and without injury to C., if he thereby made only the same appropriation of the stream that was made by his dam and mill, as they stood before; but that if D. raised his new dam higher than his old one, so as to appropriate to himself an increased portion of the stream, and set backwater upon the wheel of C.'s mill, he was answerable to C. in damages. Held also, that C. was not entitled to recover damages of D. on the ground that the removal of D.'s dam lower down the stream had prevented C. from opening the waste gates therein, or had rendered the opening of them more onerous or expensive.¹

§ 361. But of course in all conveyances, covenants, and agreements respecting overflowing land and backwater, their construction will depend upon the express stipulations they contain in connection with the nature of the right granted.² A lease, after demising a mill-site on a certain stream of water, proceeded thus: "*together with the dam now across said brook, with the privilege of using the water and water-fall created by said dam; and with the farther privilege of flowing so*

¹ Cary v. Daniels, 8 Met. (Mass.) R. 466.

² See the doctrine on this subject fully considered, Ante, § 144 *et seq.*, § 255 *et seq.*, § 273 *et seq.*, § 279 *et seq.*

much of the adjoining marsh as may be necessary, *provided that the same be not raised higher than to flow the water back even with the bottom of the apron of the water-wheel above, as the same now lays.*" It was held, that the lessee did not acquire the unqualified right of using all the water which the dam would contain as it existed at the date of the lease; but that he must so use the dam, as not to raise the water above the bottom of the apron at the upper mill.¹

§ 362. A grant of a mill "with the privilege of raising a full head of water to the usual height, from the middle of November to the middle of May, so far as respects lands of the grantor, and at other seasons as may be hereafter agreed," does not restrict the grantee to the use of the head of water during that time only; but is merely a failure to fix exactly by compact to what extent the grantee might flow for the remainder of the year, and leaves that matter as an incident to the grant, to be determined by legal adjudication.²

§ 362 *a*. If the purchaser of a mill-seat and water-power accepts from the vendor a deed without any covenant for his protection, *as to the height of the dam*, or the extent of flow to which he is entitled, and the purchaser is subjected to an action for damage, by reason of the improper height of the dam, he is without remedy, either at law or in equity.³

§ 363. It appears to be a principle well established, that where the parties to a deed, soon after its execution, and in good faith and by mutual consent place

¹ *Watt's Adm'r v. Kinney*, 6 Hill, (N. Y.) R. 82.

² *Rackley v. Sprague*, 5 Shepl. (Me.) R. 281.

³ *Hopper v. Lutkins*, 3 Green, (N. J.) Ch. R. 149.

monuments to correspond with the deed, this act is taken to fix those monuments, and to define the limits of the grant.¹ So it has been held, that a grant of a right to erect a dam within certain limits, becomes fixed, when the dam is built at a certain place within those limits by mutual consent.² The case of *Dryden v. Jepherson*, in Massachusetts,³ is considered to come within this class of cases. D., the owner of a tract of land and two mill privileges, conveyed to M. a portion of the land, with a mill privilege described in the deed by metes and bounds, "together with the privilege of a dam below D.'s factory, and of flowing the water as high as will answer and not injure or obstruct the water-wheels of D. above." It was held, that this was a grant to M. of a right to build a dam for a mill privilege, and if, for the purpose of raising the water to the height agreed upon, it was necessary for M. to extend his dam over a part of the tract not included by such metes and bounds, he was authorized to do so by the grant; that evidence of acts done by the parties under a mutual agreement, immediately after the grant was made, by way of marking the site and height of the dam to be erected by M., was competent for the purpose of determining the extent of the grant; and that M. might maintain trespass *quare clausum* against D. for cutting through that portion of the dam which was placed upon the land not included by the metes and bounds; the interest of M.

¹ Per Shaw, C. J., in *Dryden v. Jepherson*, 18 Pick. (Mass.) R. 385, referring to *Makepeace v. Bancroft*, 12 Mass. R. 472; *Davis v. Rainsford*, 17 Mass. R. 211; *Allen v. Bates*, 6 Pick. (Mass.) R. 460.

² *Boynton v. Rees*, 18 Pick. (Mass.) R. 382.

³ *Dryden v. Jepherson*, *ub. sup.*

therein being a right of possession for the purpose of the dam, so long as his mill should continue, and not a mere easement. The Court expressed their opinion that the intent evinced by parol agreement and acts *in pais*, could be carried into effect without violating the rule of law requiring all rights and interests in real estate to be manifested by some writing; and that it was the common case of going into evidence *abunde* to ascertain limits and monuments left uncertain in the description.

§ 364. Where, in the conveyance of land, a description is given which has not acquired a fixed legal construction, or a boundary is referred to, which is variable, parol evidence is admissible in order to determine the meaning and construction of the deed. By virtue of this rule, if a deed describes land as bounded on a certain pond, and upon applying the deed to the local objects embraced within its descriptive terms, it appears that the pond was a *natural* pond *raised* more or less at different times, *by means of a dam* existing and in use at the time of the conveyance, so that there is a latent ambiguity; it is competent to a party to prove, by parol evidence, that a certain line was agreed on and understood, at the time of the conveyance, as the boundary of the pond.¹

§ 365. A deed describing a boundary line as running up a river to certain falls, "thence continuing to run in such direction as to include a mill yard, and the whole of a mill pond which may be raised by a dam on said falls, to a certain road," &c., determines the boundary of the land itself, and not the height to which the pond may be raised.²

¹ *Waterman v. Johnson*, 13 Pick. (Mass.) R. 261.

² *Hull v. Fuller*, 4 Vt. R. 199.

§ 366. In grants of land some of the rights of flowing, incident to the ownership, may be *reserved* by the grantor, both by express words and by necessary implication, or they may be *excepted*.¹ D., who owned a saw-mill and clothier's works, and also the land above and below them, on both sides of the stream on which they stood, and up to the pond from which the stream flowed, conveyed to S., in 1833, a piece of the land, below the saw-mill and clothier's works, by a deed which contained these clauses: "With the privilege of flowing back the water, by a dam on said premises, within two rods of where the water is now taken out of the pond: Also the privilege of using the water on said premises for all kinds of machinery, except for a saw-mill, and clothier's works for customers: And also the privilege of drawing water from the pond, by raising the gate, for the benefit of the machinery that may be erected on said premises, under the above exception or reserve: And further, I reserve to myself, my heirs and assigns, the privilege of raising the gate at the pond, at all times, to draw water for the benefit of my machinery below." S. erected a factory on the land thus conveyed to him. In 1839, D. conveyed to W. the land lying above that which he had conveyed

¹ See the doctrine of Reservations and Exceptions, and the difference between a Reservation and an Exception, considered Ante, § 173 - 191. If owners and tenants in common of a mill and the land flowed by the stream by which the mill is operated, with the adjoining lands, make partition of the same by mutual releases, assigning the mill and privilege to one, and land adjoining, with a portion of that which was flowed, to another, and the release to the latter contains the words "brook to remain forever for the use of the mills, as heretofore, forever;" the mill-owner is entitled to flow the land of the other releasee to the extent that it had been usually flowed by previous dams, without being subjected to the payment of damages, under the statute of flowing. *Vickerie v. Burwell*, 1 Shepl. (Me.) R. 289.

to S., extending to the pond, and also a strip of land, two rods wide, on the side of the land conveyed to S., and the deed of conveyance relinquished to W. the right to flow any other land which D. owned, by a dam which might be, or could be raised, on the premises thus conveyed: W. dug a canal through said strip, and conveyed the water, through said canal, into the stream below the land and factory of S., thereby rendering said factory nearly useless: S. brought an action against W. for diverting the water, and W. attempted to justify, on the ground that S. had raised the water higher than within two rods of where it was taken out of the pond, when he received his deed from D., and had thus exceeded the limit of the right granted to him by that deed; and that W. had diverted only so much of the water, as to keep it down to that limit. Held, that all the reservations in D.'s deed to S. were for the benefit of D.'s saw-mill, &c., and were to him and his assigns, as owners thereof; and that W., not having purchased the saw-mill, &c., could not set up those reservations for any purpose; that there was not in D.'s deed to S., either by express words or necessary implication, any restriction, on which D.'s grantors or assigns could insist, to prevent S. from flowing D.'s land beyond the line mentioned in that deed, subject to payment of damages under the mill acts, provided such flowing should not interfere with any mill above; and that if S. had raised the water, for the use of his factory, higher than the limit mentioned in his deed from D., W. was liable to an action for diverting it, and that W.'s remedy against S., if any, was under the mill act.¹

¹ Judd v. Wells, 12 Met. (Mass.) R. 504.

§ 367. There has been already occasion to invite attention to exceptions in conveyances that are void for *uncertainty*.¹ Where A granted eighty-six acres of land to B, reserving the streams of water and the soil under them, with the right of erecting mill-dams, and all such parts of the land as shall be overflowed by water for the use of mills for the grantor; and B sold forty acres of the premises to C, with the like exceptions; and C erected a dam on his part of the land, by which the land of B was overflowed; it was held, that until A exercised his right and erected dams, the reservation was inoperative, and if considered strictly as an exception, would be void for *uncertainty*.²

§ 368. A grant of land bounding on or near a pond and stream excepting the mill and water privilege, is an exception of the right of flowing the land so far as is necessary or convenient, or so far as it has been usual to flow it for that purpose; and in such case the grantee takes subject to the easement, and the existence of the easement is not an encumbrance on the premises granted.³

§ 369. An exception of a mill-site in a grant, operating as a reservation of the soil of the mill-site, and of the right of flowing so much land as is necessary for a mill-pond, is not a reservation of a mere easement, but of the soil itself; and the grantor and his assigns may enter upon and locate under the exception, even after the grantee has conveyed and assigned his interest to another.⁴

¹ Ante, 175, 176.

² Thompson v. Gregory, 4 Johns. (N. Y.) R. 80.

³ Pettee v. Hawes, 13 Pick. (Mass.) R. 323.

⁴ Jackson v. Vermilyea, 6 Cow. (N. Y.) R. 677.

§ 370. The owner of a farm on which there was a fall of water, conveyed the fall by deed, and also conveyed as follows: "All those lands lying upon Queechy South Branch which shall be subject to be covered with water by virtue of a dam being erected six feet in height from low-water mark" at the fall conveyed, with a proviso, that the water be drained off yearly from the first of May to the first of September. Subsequently he conveyed to the owner of the fall, "all that land, except the land belonging to B. and S., which is covered by the waters of the said South Branch overflowing the dam on said Branch, which dam is raised six feet above low-water mark; however, all those lands covered by said water, and are connected with the main body of the water by small outlets, are not conveyed." It was held, that the deeds conveyed a right to flow all the lands of the grantor by such dam, except as against the owners of the land belonging to B. and S., and that the dam might be raised and kept up six feet from the bed of the stream, as it was when the deed was executed.¹

§ 371. In a complaint for flowing under the statute of Maine, it appeared that L. conveyed two lots of land which included a mill privilege and saw and grist-mill on the premises to S. by deed, containing a reservation in these words: "Excepting and reserving out of the same, the one half of the grist-mill and saw-mill built by said S. on said lots, together with one half of all the privileges appertaining to the said mills, as the improving of the mill-yard, &c. Also said S. has a right of raising a head of water, all

¹ *Mower v. Hutchinson*, 9 Vt. R. 242.

seasons of the year, not damaging the owners of the land above, as also said L. reserves to himself." It was held, that this gave a license to flow the grantee's other land; and that L., as to his part of the privilege, was to have the same right to flow the contiguous land conveyed, as S. had to flow the other land of the grantor.¹

. 6. *Prescription, or Twenty Years' Enjoyment.*

§ 372. A right to overflow land or to raise the water to the injury of an upper mill privilege, may, like easements in general, be acquired by an uninterrupted and adverse enjoyment for twenty years, or for the period of time, whatever it may be, limited by the Statute of Limitations for the right of entry upon land.² For the general law upon this subject, the reader is referred to a former chapter,³ where it has been elaborately considered in all its ramifications; it being only here

¹ *Rackley v. Sprague*, 1 App. (Me.) R. 844.

² *Alder v. Savill*, 5 Taunt. R. 454; *Cowell v. Thayer*, 5 Met. (Mass.) R. 253, and cases there cited; *Sargent v. Gutterson*, 13 N. Hamp. R. 467; *Wilson v. Wilson*, 4 Dev. (N. C.) R. 154. In *Sherwood v. Day*, 4 Day, (Conn.) R. 244, it appeared, that the plaintiff had a fulling-mill on the stream of water with a corn-mill belonging to the defendants, who about ten years before raised their dam one foot higher than it had ever previously been; by which the water was thrown back upon the wheel of the plaintiff's mill, and its motion so much impeded, that it could not be used. It was proved, that the fulling-mill had been in constant use for more than forty years. The defendants produced a grant from the town of F. giving authority to build a corn-mill on the very site occupied by the defendants' mill. In giving judgment, the Court said, — "The mill of the plaintiff had been erected for more than forty years; and during the whole of that time, except the last ten years, the stream of water had been suffered to flow off below without interruption, or any obstruction to the injury of the owner of the fulling-mill. It is, therefore, now too late to deny the plaintiff's right after so long an enjoyment of the privilege."

³ Ante, Chap. VI.

proposed to show the instances of its application in cases of alleged injury by throwing back the water.

§ 373. Where authority is conferred by statute to flow land, on payment of damages, if a mill-owner has in fact exercised the privilege of keeping up his dam, and flowing the land of another person, for a period of twenty years, without payment of damages, it is evidence of a right so to flow without such payment, and will bar a claim for damages.¹

§ 374. An upper riparian proprietor may have acquired such an easement in the land of a lower proprietor, as to compel the latter to cleanse and *keep open* the watercourse as often as becomes necessary, to prevent the water being thrown back to the injury of the former; and it is not necessary that the lower proprietor should have notice of the injury so occasioned. His cleansing and opening as soon as he had notice, shows that he acts properly, and as a person in his situation ought to do; but that is no defence in point of law against a complaint for an antecedent injury. The action is not founded on malice, or the breach of any moral duty, but is for a compensation for damage sustained by the neglect of a legal duty; and, if damage has been so sustained, the defendant is not the less bound to compensate for that, because he has promptly repaired his fault.²

§ 375. In all such cases of claim to a prescriptive right, the enjoyment set up must be *peaceable, open, and uninterrupted*; ³ and it is material, also, that it be adverse, or *as of right*; ⁴ and in the words of Mr. J. COWEN,

¹ *Williams v. Nelson*, 23 Pick. (Mass.) R. 141:

² *Bell v. Twentymen*, 1 Adol. & Ell. (N. S.) 766.

³ Ante, § 210 – 216:

⁴ Ante, § 216, *et seq.*

it must be "in complete analogy to its archetype — the bar in ejectment."¹

§ 376. Where the plaintiff erected, in 1799, a mill, and the defendant, who owned a mill below, was in the habit of raising his dam by means of flash-boards, whenever the water was low; but within twenty years after the erection of the plaintiff's mill, had been frequently ordered to take down the flash-boards, and had always acquiesced, claiming no right to keep them up to the injury of the plaintiff; and afterwards admitted that he had no right to keep them up: it was held, that this evidence was sufficient to defeat any claim by prescription on the part of the defendant, and to rebut the presumption of a grant.²

§ 377. Where the right to flow land, under the statute of flowing in Virginia, it was provided by an inquest, that the water was not to be raised higher than a certain log; and the dam being raised higher than the log, caused the water to flow back upon the plaintiff; and the evidence tended to show, that the dam had been higher than the log for more than twenty years, but that the plaintiff had complained of it, denied

¹ Colvin v. Burnet, 17 Wend. (N. Y.) R. 564, and see Ante, § 204 and § 209; and as to *disabilities*, Ante, 237, 238. In Shumuy v. Simons, 1 Vt. R. 53, Boyce, J., in a case of flowing land, says, — "The modern doctrine of presumption is founded in analogy to the statute of limitations. It is applicable to cases for which the statute has not provided, and the evidence in support of the presumptive right must at least be sufficient to have established the legal right, provided the statute had extended to the case in judgment." See also Mitchell v. Walker, 2 Aik. (Vt.) R. 269. In Hart v. Vose, 19 Wend. (N. Y.) R. 365, which was a case of *flowing*, it was held that the uninterrupted enjoyment was *prima facie* evidence that it was adverse, but such conclusion might be rebutted by proof that it was *commenced* and *continued* without claim of right.

² Sumner v. Tileston, 7 Pick. (Mass.) R. 198; and see Ante, § 221.

the right to raise it, and threatened to sue ; it was held, that the use and enjoyment by the defendant, and those under whom he claimed, although it was exclusive and adverse, and existed for more than twenty years, was not conclusive evidence of the defendant's right, but presumptive merely ; and that evidence tending to show that such enjoyment was not acquiesced in, but the right thereto contested, was proper evidence to rebut the presumption.¹

§ 378. Where a dam which makes backwater is intended to be only temporary, the enjoyment of it is not adverse, and the time which it is used, cannot be connected with the time during which a permanent dam, subsequently erected, has been used, in order to make out the length of enjoyment sufficient to confer a prescriptive right. When the defence to an action for the obstruction of a watercourse by the erection of a dam below the plaintiff's works, and thereby setting the water back upon them, was a right in the defendant acquired by prescription, to raise the water, in the manner and to the height complained of ; and it appeared that the defendant at first erected a temporary wooden dam, by which the water was raised to that height ; but he afterwards, for his convenience in erecting a permanent stone dam, discharged the water for some time through a wasteway, in consequence of which the water was so lowered as not to flow up to the plaintiff's works ; and then, when the permanent dam was completed, the water was raised again by means thereof to the height complained of, and was so continued ; it was held, that the period of user by

¹ *Nichols v. Aylor*, 7 Leigh, (Va.) R. 546 ; and see *Ante*, § 217-221.

virtue of which the prescriptive right claimed by the defendant could be acquired, did not commence until the water was permanently raised by the stone dam, after its completion.¹ A dam for a temporary purpose, though it may imply permission from the supra-riparian owner to erect it, does not authorize, after the decay of it, the erection of another dam in its place.²

§ 379. The extent of the prescriptive or presumed right is determined by the *user*, the right acquired being commensurate with the actual enjoyment.³ In *Stiles v. Hooker*,⁴ it was held, that where one has had the use, at a given height, for twenty years, a grant will be presumed of the privilege of using it at such height, but nothing beyond can be claimed; and if the person repairs his dam, which has kept the water at that height, so as to raise the water higher, and flow it back upon an upper mill, an action will lie therefor, though the dam itself remains at its ancient height; that the question is not altogether upon the height of the dam, but of the water. In such cases, the person injured may reduce or change the dam so as to lower the water to its proper height; though he has no right to demolish the dam entirely.⁵

§ 380. But a mill-owner, who has acquired a prescriptive right to keep up a dam constantly, which, in

¹ *Branch v. Doane*, 17 Conn. R. 402, and 18 Conn. R. 233.

² *Hepburn v. McDowell*, 17 S. & Rawle, (Penn.) R. 383.

³ *Ante*, 224, *et seq.*

⁴ *Stiles v. Hooker*, 7 Cow. (N. Y.) R. 266. In *Russell v. Scott*, 9 Cow. R. 279, it was held, in reference to a prescriptive right to flow, that if the dam be raised, and the flow increased within twenty years, an action lies.

⁵ *Dyer v. Dupui*, 5 Whart. (Penn.) R. 584; and see *Heath v. Williams*, 12 Shepl. (Me.) R. 440.

its usual operation, would raise the water to a certain height, although, from the leaky condition of the dam, or the rude construction of the machinery in the mill, or the lavish use of the stream, the water has not been usually and constantly kept up to such height; yet if he repair the dam, without so changing it as to raise the water higher than the old dam, when tight, would raise it; or if he use the water in a different manner, and thereby keep up the water more constantly than before, this is not a new use of the stream, for which a land-owner can claim damages, but is a use conformable to the mill-owner's prescriptive right.¹

§ 381. The owner of a mill privilege brought an action against the owner of another mill privilege below him, for an injury to his privilege, caused by the defendant erecting a new dam higher than his old one. The Court, on the trial, instructed the jury, that if the plaintiff's wheels had not been obstructed within twenty years before, as since the erection of the new dam of the defendant, and if such obstruction was caused by the defendant's dam, then the law was for the plaintiff. It was held, that the instruction was erroneous, as the fact that the plaintiff's wheels were obstructed more after the erection of the new dam than before, was not conclusive of the question whether the new dam exceeded the height of the defendant's old dam; especially where it appeared in evidence that other causes existed (causes other than the height of the dam) to raise the water higher than before.²

§ 382. There may undoubtedly be a definite limita-

¹ *Cowell v. Thayer*, 5 Met. (Mass.) R. 253.

² *Maniere v. Myers*, 6 B. Mon. (Ken.) R. 132.

tion or modification of the use, and one that is practicable and measurable. As where, for example, according to the custom of the country, a saw-mill or other mill has been kept up in the winter only, and the mill-owner has uniformly been accustomed to draw off the water sufficiently early in the spring to allow the growth of a crop of grass, and to continue it down until the hay is made, it must be regarded as establishing a right to a winter privilege only, and not a constant privilege; and then flowing the land through the year, exceeds the limit and measure of the mill-owner's prescriptive right.¹ So, where a dam had been kept up more than twenty years, but the water had been drawn down six weeks in each year, between June and October, to enable the land-owners to get clay, it was considered good evidence of a right to keep up the dam subject to such limitation.²

§ 383. In determining the legal rights of parties, the law doubtless looks rather to practical than to theoretical distinctions, and seeks, as far as possible, to place them upon grounds permanent and general, and upon principles applicable to the generality of cases, without varying by a slight change of circumstances. When the prescriptive right is once established, it should be construed favorably to the party who has acquired it.³ Conformably to these rules, it has long been held, that where one has acquired a right to raise and maintain a head of water, by using it for one purpose, he may use it for another; he may, for instance, substitute a cotton

¹ Per Shaw, C. J., in *Cowell v. Thayer*, *ub. sup.*

² *Bolivar Manuf. Co. v. Neponset Manuf. Co.* 16 Pick. (Mass.) R. 241. And see *Ante*, § 224 – 231.

³ See opinion of Shaw, C. J., in *Cowell v. Thayer*, *ub. sup.*

factory for a saw-mill, and the like ; and this, upon the ground, that any other rule would stop all improvement in machinery.¹

§ 383 *a*. To establish a prescriptive right to flow by a dam, it is not necessary that the dam should be maintained for the whole period, on the *same spot* ; it being sufficient to show that it has been maintained on the same *mill-site*, though removed, from time to time, to *different places* upon such site.²

§ 384. The question was one of an extended enjoyment of a prescriptive right, in *Chapman v. Thames Manufacturing Company*. A owned lands adjoining a lake, into which the waters of the lake were drawn for the use of the mill below. The dam of the mill-pond, and the mill were ancient, and the owners of them had cut a channel through a sand-bar anciently formed, near the outlet, to let the water of the lake pass to the pond and thence to the mill ; which channel, when filled with sand, by the flowing of the water of the lake, such owners would occasionally clear out. In an action brought by A against B for raising recently, by means of a conduit through the sand-bar, instead of the former channel, the water of the lake, so as to cause it to overflow A's land, to a greater extent than they had been accustomed to flow ; it was held, that A having acquired the right to have the water kept down to the level to which it was accustomed to flow, after the removal of the natural obstruction, might lawfully enforce that right, if the water, even by natural causes, became again obstructed ; and that the facts alleged

¹ See Ante, § 226 – 231.

² *Stackpole v. Curtis*, 2 Red. (Me.) R. 383.

³ *Chapman v. Thames Manuf.* 13 Conn. R. 269.

being proved, B was liable, although the sand-bar and the filling up of the channel from natural causes, without any act of B, would raise the water in the lake as high and cause it to overflow A's land to the same extent.

§ 384 *a*. An instrument was made under seal between the owner of a mill-dam and the owner of land flowed thereby, stipulating, on the part of the owner of the dam, that he would reduce its height to a specified point, and forever keep it so reduced to that point; and *granting* on the part of the land-owner, a right to flow his land by a dam, while it continued reduced to the stipulated point; reserving, however, the right to annul the grant, whenever the dam should be raised above that point. It was held, 1st, that the covenant of the owner of the dam to keep its height reduced was an *independent* covenant; 2d, that the contingent reservation by the land-owner to annul his grant, gave no election to the owner of the dam to raise it, after having once reduced it to the stipulated point; 3d such a reservation affords no protection to the dam-owner, in a suit upon his covenant to keep the dam reduced; 4th, in such suit, whatever previously acquired right of maintaining the dam to its original height, may have been vested in the owner by *prescription*, he is *precluded by his covenant*, from setting up such previous right as a defence.¹

§ 385. A prescriptive right to overflow land, or set back the water upon an upper mill privilege, may be lost or extinguished by a total non-user for the full

¹ *Stinson v. Gardiner*, 3 Red. (Me.) R. 94.

length of time required to gain it;¹ and so likewise by *unity of possession*.² The easement of flowing land, however, if created by an *express* grant, is not lost by a mere non-user for twenty years; for, as has been before laid down, a distinction in this respect is recognized between an easement created by deed and one created by prescription. In the one case, there must not only be disuse, but an actual adverse user, and in the other, mere disuse is sufficient.³ But both easements gained by prescription and those acquired by express grants, may become extinguished by an abandonment for a less period than twenty years, if the abandonment is attended by certain acts of the owner showing an intention to surrender, and the person whose land is affected by the easement, or has been subject to be flowed, conducts himself under the influence of the evidence of such intention.⁴ It was in this mode that the prescriptive right to flow land was extinguished, by the judgment of the Court, in *Taylor v. Hampton*,⁵ a full account of which has already been presented.⁶ Where a mill-owner who has a grant of a right to flow certain lands, suffers his mill to go to decay, and ceases to flow the land, and a highway is then made across the land, he cannot, by afterwards granting his mill privilege and right to flow, authorize his grantee to overflow such highway by means of a

¹ See the doctrine in relation to this subject considered Ante, § 240 – 247; *French v. Braintree Manuf. Co.* 23 Pick. (Mass.) R. 216.

² See Ante, § 191 – 200.

³ See Ante, § 252; *Mower v. Hutchinson*, 9 Vt. R. 242.

⁴ See as to the doctrine of Extinguishment of Easements, § 246 – 253.

⁵ *Taylor v. Hampton*, 4 M'Cord, (S. C.) R. 96.

⁶ Ante, § 248.

new mill-dam on the site of the old one.¹ Again, an express declaration by the owner of a mill privilege, that it is no longer his intention to keep up the mill, accompanied with corresponding acts, such as removing the dam and mill, giving notice of such intention to those whose lands he has flowed, and to whom he had paid damages, will be deemed an extinguishment of the privilege.² Still a non-user *alone* of a prescriptive right to flow for a period less than twenty years, is not sufficient evidence of an abandonment of such right.³

§ 386. As stated in a former chapter, the enjoyment of an incorporeal hereditament for twenty years may be shown not to have been adverse, by evidence that the premises in question have been in the possession of a *tenant for life or years*, or that the party has been under *legal disability*.⁴ Where there was injury done to church lands, by a rivulet being penned back upon them by a head-stock, and the existence of the head-stock for about twenty years was proved; it was held, that the evidence, though it would be in general sufficient, was not so in this case, as no grant of a prior incumbent would bind his successor.⁵ Time does not run against a privilege of flowing reserved in a deed, until some default or acquiescence is shown, as where the reservation is to the heirs and assigns of the grantor.⁶

¹ Commonwealth v. Fisher, 6 Met. (Mass.) R. 433.

² French v. Braintree Manuf. Co. 23 Pick. (Mass.) R. 216; and see Fitz v. Stevens, 4 Met. (Mass.) R. 428.

³ Williams v. Felson, 23 Pick. (Mass.) R. 141.

⁴ Ante, § 231 – 240.

⁵ Wall v. Nixon, 3 Smith, R. 316.

⁶ Butz v. Ihrie, 1 Rawle, (Penn.) R. 218.

Parol License.

§ 387. The right of flowing land, or of making back-water, is an incorporeal hereditament, and, therefore, can only be created by deed, or by prescription, which supposes one.¹ The utmost effect which a parol license to flow land has, is to protect the person acting by the authority of it against an action for damages until it is revoked by the licensor. A licensee may give evidence of the license, and thus defeat a claim for damages by the licensor, sustained while the license remains unrevoked. To allow a parol license to convey any *permanent* interest in land, or one which can be assigned by the licensee, or descend to his heirs, would be directly contrary to the statute of frauds.² It was so expressly adjudged in Vermont;³ and a grant of the right of flowing land without paying damages, under the statute of Massachusetts regulating mills, was held to be an easement, and *an interest in land*, and could only be made by deed; although a claim for mere damages caused by the flowing might be *waived* by parol, inasmuch as it is always a good defence to a claim for a sum of money, that it has been paid or satisfied by agreement.⁴ In a complaint for flowing the land of the complainant, in Maine, the Court held, that the right to overflow the complainant's land, without paying damages, could not be established

¹ Ante, § 168 – 173.

² That such is the true doctrine in regard to parol licenses, the reader is referred back to Chap. VIII., in which all the cases upon the subject are reviewed and commented on.

³ Hall v. Chaffee, 13 Vt. R. 150.

⁴ Fitch v. Seymour, 9 Met. (Mass.) R. 462.

by proof of a parol agreement or license made with his grantor.¹ In giving judgment in this case, the Court considered, that the decision in *Clement v. Durgin*, in that State,² should not be construed to go further than to settle the rights between those parties as to the payment of damages, and to persons similarly situated. The most that can be accomplished by a parol license, is, that it may work the *extinguishment* of an easement;³ as where, for example, permission is given to the person whose land is subject to be flowed by virtue of a written grant or by prescription, by the mill-owner to remove his dam, and the other party by labor and by incurring expense, has removed the dam. But a Court of Equity, as we have seen, though it does not hold that a right in land passes by a parol license, will hold, that wherever one party has executed it by taking possession and expending money, the other party is bound to carry it into execution.⁴

¹ *Seidensparger v. Spear*, 5 Shepl. (Me.) R. 123. See likewise *Branch v. Doane*, 17 Conn. R. 402.

² *Clement v. Durgin*, 5 Greenl. (Me.) R. 9.

³ See Ante, § 316.

⁴ See Ante, § 318, *et seq.*

CHAPTER X.

OF THE NATURE OF THE INJURIES DONE TO, AND BY MEANS OF, A WATERCOURSE; THE REMEDIES; AND OF THE PARTIES, PLEADINGS, AND EVIDENCE.

1. Nature of such Injuries.
2. Remedy by Act of the Party.
3. Remedies at Law.
4. Action on the Case.
5. By whom to be brought.
6. Against whom to be brought.
7. The Declaration.
8. Pleas.
9. Evidence.
10. Actions of Covenant and Assumpsit.
11. Equitable Remedies.

1. *Nature of such Injuries.*

§ 388. It has been seen, that every diversion and unreasonable detention of the water of a watercourse, by one riparian owner, is an invasion of the rights of the riparian owners below him; and also that throwing the water back beyond the line where the water enters upon the land of the party, is an invasion of the rights of the riparian owner above him. The principle upon which the Common Law proceeds in respect to such invasions of the rights of riparian owners, is, as there has already been several times occasion to observe, *sic utere tuo ut alienum non lædas*, enjoy your own property in such a manner as shall cause no detriment to another person. Every injury then to a watercourse, as by diverting it, and every injury by means of a watercourse, by throwing the water back upon another ripa-

riar owner above, is repugnant to this maxim, and is a species of tort denominated a *nuisance*; and when private rights only are involved, a *private* "nuisance." The distinction between "nuisance" and "trespass" is, that the former is only a consequence or result of what is not directly or immediately injurious, but its effect is injurious. A person who digs a channel, or erects a dam on his own land, does no more than what is, in itself, lawful, but as the effect of his so doing, is to divert the water from a natural watercourse to the loss of a riparian owner below, or to turn it back to the injury of a riparian owner above, such acts become unlawful; the law in such instances taking care, says Blackstone, "to enforce the précept of gospel morality of 'doing to others as we would that they should do unto ourselves.'" Trespass, on the other hand, is a direct and immediate invasion of property, as treading down grass in a neighbor's field, or destroying his inclosures. Having said thus much as to the nature of the injuries *to* and *by means of*, a watercourse, we proceed next to treat of the legal and most proper modes of obtaining redress.

2. *Remedy by Act of the Party.*

§ 389. It is very well known, that private nuisances may be removed by the party aggrieved, if it can be peaceably done, or without occasioning a riot.¹ Thus,

¹ 3 Black. Comm. 5. "Note, reader," says Lord Coke, "there are two ways to redress a nuisance, one by action, and in that he shall recover damages, and have judgment, that the nuisance shall be removed, cast down, or abated, as the case requires; or the party aggrieved may enter and abate the nuisance himself." *Batten's Case*, 9 Rep. 54 b. It was resolved by all the Justices, "that a man aggrieved by a nuisance may

if a ditch is dug, by means of which the water is diverted from the land of a riparian proprietor through whose land it would otherwise flow in its natural course, he may go upon the land of the wrongdoer and fill it up.¹ So the law affords the owner of land protection against the flow of backwater on his land or upon his mill, and he may lawfully enter upon the land of the person causing the injury, and remove the obstruction by which it was occasioned.² Indeed in all cases of wrongfully diverting or detaining the water, and of flowing land, &c., the aggrieved party may, by the Common Law, enter the close of his neighbor for the purpose of *abating* the nuisance, or removing the cause of the injury to which he has been thus subject.³ In Missouri, to divert or obstruct a

enter upon the land of another and abate the nuisance, by the Common Law, without prescription, and trespass will not lie against him, either for the entry or abatement." Broke's Abridg. "Nuisance," f. 151 b. pl. 33. In 2 Rolle, Abr. Nusans, (S.) if a man erects any thing upon his own soil which is a nuisance to my mill, house, or land, I may remain (*estoier*) on my own soil, and throw it down. And so I may enter on his soil and throw down the nuisance, and justify this in an action of trespass. This passage was relied on in *Raikes v. Townsend*, 2 Smith, R. 9, as an authority for confining the right to abate a nuisance to the cases of a nuisance to a mill, house, and land; but Lord Ellenborough, C. J., said, "These cases are only put as instances." The case before him was an action for the obstruction of a rivulet, by means whereof the defendant's cattle could not obtain water so plentifully as before, and the defendant entered upon the soil of the plaintiff, and abated the dam. And see *Great Falls Co. v. Worster*, 15 New Hamp. R. 412; *Huy v. Cohoes Co.* 3 Barb. (N. Y.) Sup. Co. R. 42.

¹ Vin. Abr. Tit. "Nuisance."

² *Colburn v. Richards*, 13 Mass. R. 420; *Heath v. Williams*, 12 Shepl. (Me.) R. 209.

³ *Jebb v. Povey*, 1 Esp. R. 679; *Cowper v. Barber*, 3 Taunt. R. 99; *Hodges v. Raymond*, 9 Mass. R. 316; *Gleason v. Gray*, 4 Conn. R. 418; *Strong v. Benedict*, 5 Conn. R. 210; *Greenslade v. Halliday*, 6 Bing. R. 379; *Dimmett v. Eskridge*, 6 Munf. (Va.) R. 308.

private watercourse, is held by the Common Law to be a private nuisance; and although obstructions to private watercourses are declared by statute¹ public nuisances, yet, it is held, that such statute is merely cumulative, and made for the sake of the remedy, and not with a view to alter or affect the remedies afforded by the Common Law to individuals for such injuries.²

§ 390. In abating a private nuisance, a party is bound to use reasonable care that no more damage be done than is necessary for effecting his purpose.³ Thus, where the plaintiff had a right to irrigate his meadow by placing a dam composed of loose stones across a watercourse, and occasionally a board or fender, and he fastened the board with two stakes, which he had no right to do, the defendant was held liable for pulling down the board, as well as the stakes, although, as owner of the adjoining land, he was lawfully empowered to abate the latter.⁴ So if a person entitled to raise a stream of water to a certain height, raises it higher than he is entitled to do, the person injured thereby, though he may reduce the dam, has no right to *demolish* it.⁵ The owner of a water-mill has so much of an easement in the land

¹ Rev. Stat. Missouri, 1815, tit. "Mills and Mill-dams," s. 23, p. 408.

² *Welton v. Martin*, 7 Missou. R. 307. The statute of Iowa making it a penal offence to injure a mill-dam, does not take away the common-law right to abate the nuisance. *State v. Moffett*, 1 Greene, (Iowa,) R. 247.

³ Com. Dig., Action on the Case for a Nuisance; 1 Crabb., Real Prop. § 431; *Gates v. Blincoe*, 2 Dana, (Ken.) R. 158; *Moffet v. Brewer*, 1 Greene, (Iowa,) R. 348.

⁴ *Greenslade v. Halliday*, 6 Bing. R. 379.

⁵ *Dyer v. Depui*, 5 Whart. (Penn.) R. 584; *Heath v. Williams*, 12 Shepl. (Me.) R. 44.

below, for the free passage of the water from the mill, in the natural channel of the stream, as to give him a right to enter upon the land for the purpose of removing obstructions to the free flow of the water ;”¹ but in so doing he must not occasion any unnecessary damages.² The right or the duty of the mill-owner in such cases, to place on the adjoining banks, or to carry off the materials taken out, may depend on the nature of the materials, and other circumstances in the particular case. If the stream is walled up, and the stones have fallen in, it would seem to be the right and the duty of the mill-owner, in removing the stones, to replace them on the wall. If the material be soil, which has fallen from the adjoining bank, and which may be useful to the owner of the land, for the purpose of enriching the soil, or otherwise, it would be the duty of the mill-owner to place it on the bank for his use. But if it be material not useful, it would be the duty of the mill-owner to remove it off the land in a reasonable time, and in a manner the least prejudicial to the owner of the land.³

§ 391. Still if the person injured by the nuisance of a diversion or obstruction of a watercourse, abate no more than is necessary, any damage resulting from the act to him who occasioned the nuisance, must be submitted to.⁴ Where one riparian owner erects a dam partly on his own land and partly on the land of another, and the other thereupon pulls down the part of the dam which is on his land, by which the entire

¹ Prescott v. Williams, 5 Met. (Mass.) R. 429.

² Prescott v. White, 21 Pick. (Mass.) R. 341.

³ Per Shaw, C. J., in Prescott v. White, *ub. sup.*

⁴ Woolrych on the Law of Waters, &c., 225.

dam is prostrated, the act of pulling down the part of the dam will be held justifiable.¹

§ 392. The thing complained of cannot be abated until it actually becomes a nuisance ; so that if one see his neighbor commencing any work which probably will, when completed, be a nuisance, it cannot be abated while in an inoffensive state,² though the person whose rights are thus in jeopardy may seek protection in a Court of Equity. If a riparian proprietor on a river in which the public have an easement for the passage of lumber, erects a dam which obstructs such passage, another below him cannot justify the erection of a dam which causes the water to overflow the dam above, on the ground that it is a *public* nuisance.³

§ 393. It is laid down by Blackstone, that if a nuisance is abated by the party injured, he is entitled to no action for the damage ; and the reason he gives is — there was choice of two remedies, either without suit, by abating it, or by suit, in which both damages may be recovered and the nuisance removed ; but the election having been made of one remedy, the party is precluded from the other. But this rule, as it regards the remedy by an action on the case for the recovery of damages, which we shall soon consider, must be subject to qualification, for the party's right to bring this action may attach before the removal of the nuisance, and it would be inconsistent with well-established principles, to preclude him, in an action on the case for damages, from a recovery of damages sustained prior to the abatement.⁴

¹ Wigford v. Gill, Cro. Eliz. 269.

² 12 Mod. R. 510 ; Holt's Cases, 499 ; Ante, § 140.

³ Odiorne v. Lyford, 9 N. Hamp. R. 502.

⁴ Gleason v. Gray, 4 Conn. R. 418.

3. Remedies at Law.

§ 394. In addition to the remedy for private nuisances by act of the party, or by *abatement*, there have been known in the law the following judicial remedies: 1. The writ, *Quod Permittat Prostenere*. 2. *Assize of Nuisance*. 3. *Action on the Case*. The *Quod Permittat*, &c., was an ancient remedy in the nature of a writ of right, which commanded the defendant to permit the plaintiff to abate the nuisance, and, upon his refusal, to summon him to appear in Court and show cause why he refuses. The plaintiff has judgment both to abate the nuisance, and to recover damages; and the writ could be maintained as well for the alienee of the party first injured, as against the alienee of the party first injuring. The *Assize of Nuisance*, was a writ wherein it was stated, that the party injured complains of some particular act done *ad nocumentum liberi tenementi sui*, and commanded the sheriff to summon an assize, that is, a *jury*, and view the premises, and have them at the next commission of assizes, that justice be done therein. If the assize passed for the plaintiff, he had judgment to have the nuisance abated, and to recover damages.¹ But both these remedies have become obsolete,² and fell into disuse in England, long before they were expressly abolished by the Act of 3 & 4 Wm. c. 27, s. 36.³ The *Action on the Case*, the nature of

¹ 3 Black. Comm. 220, 221; 9 Rep. 55.

² *Blunt v. Aiken*, 15 Wend. (N. Y.) R. 525; *Waggoner v. Germaine*, 3 Denio, (N. Y.) R. 306; *Great Falls Co. v. Worster*, 15 N. Hamp. R. 412, 435.

³ In a case in Pennsylvania, as late as 1828, C. J. Gibson, in delivering the opinion of the Court, said, that notwithstanding the recognition of the

which, and the proceedings in which, we shall next consider, only enables the party to recover satisfaction for the damage he has suffered, and there is no judgment therein for the removal of the nuisance; but as every continuance of a nuisance, after damages recovered, is held to be a fresh one, a new action will lie; and probably very exemplary damages would be given, if, after one verdict against him, the defendant should persist in continuing it.¹

4. *Action on the Case.*

§ 395. This remedy is the judicial one now always resorted to in the usual cases of consequential injury

assize of nuisance as an existing remedy, it had been incidentally suggested, that it was not too late to discard it; that he was not for reviving obsolete forms, but that it was too late to make a stand now, it having been established by repeated decisions of this Court, that all Common-Law actions that had not been abolished by the legislature, were in force in Pennsylvania precisely as they are in England. He considered the case before him as a pregnant instance of the inconvenience of the rule, yet, he adds, he would be the last to shake what has been as firmly established as a train of decisions by the Court in the very last resort can establish any thing. The ground on which it had been recognized was, that it was all along a living remedy, although dormant; and, like the man who awaking from a trance of twenty years in the Catskill mountains, was so altered, that on returning to his native village his former acquaintances did not know him, the assize of nuisance is to be received with the same modifications in practice which time had impressed upon the forms of other actions. *Barnet v. Ihrie*, 17 S. & Rawle, (Penn.) R. 175. And see 2 Binn. R. 192; 9 S. & Rawle, R. 823; 11 Ib. 271; Brack. Law Miscel. 248.

¹ In Massachusetts, is a provision by statute, that where judgment shall be rendered for the plaintiff, in an action on the case for a nuisance, "the Court may, on motion of the plaintiff, in addition to the common execution, issue a warrant to abate the nuisance," and it leaves it within the discretion of the Court to grant or refuse such motion. The provision is remedial, and not unconstitutional when applied to a nuisance created, and action brought, before the statute was passed. *Bemis v. Clark*, 11 Pick. (Mass.) R. 452.

done *to*, or *by means of*, a watercourse. The general result of the English authorities, renders it very clear, that where the damage does not immediately ensue from the act complained of, it is consequential, and case is the proper remedy; and, on the contrary, where the act itself, and not the consequence of it, occasions the mischief, trespass is the right action.¹ If a person pour water upon his neighbor's land, the injury is immediate, and trespass should be brought; but if he stop a watercourse on his own land, or place a spout in such a direction as to damage the land of another, the mischief of the latter acts is consequential, and the party should bring an action on the case.²

¹ Woolrych, 222, who cites Chitty on Pleading, ed. 1811, vol. i. pp. 125, 126. To draw the line of distinction between trespass and case, Judge Gould, of Connecticut, considers to be the most subtle part of the law. We are indebted to this very learned lawyer for the following rules, which he has given in his Law Lectures:— When the original act occasioning the injury was forcible, the remedy is in some cases trespass, in others trespass on the case. If the forcible act is immediately injurious, trespass is the proper action; if, on the contrary, the injury for which redress is sought, is the remote or consequential effect of the forcible act, the remedy is trespass on the case. As, if A throws a log across a highway, and B injures himself by falling over it, here the injury to B is consequential, and the remedy is trespass on the case. The difficulty is in applying the last rule, and in distinguishing what is the *immediate* and what the *consequential* effect of any forcible act. The injury to be immediate within the rule, need not be the instantaneous effect of the forcible act. When it is instantaneous, there is no difficulty in the application. Injuries which are not the instantaneous effect of some forcible act, are in some cases regarded as immediate, in others consequential. 1. When the immediate or proximate cause of the injury produced is but a continuation of the original force, the effect is immediate. 2. On the other hand, when the original force ceases before the injury or damage commences, such injury or damage is consequential, and the author of it is liable in trespass on the case only. These two general rules, Judge Gould thinks, will embrace every possible case.

² Woolrych, 222; Chitty on Pleading, ed. 1811, vol. i. pp. 125, 126.

The defendant caused water to overflow the plaintiff's fishery, by throwing down a weir in the plaintiff's close, where the defendant was a trespasser, and trespass was brought. There was also a count in case, and it was urged, that this was not a trespass, and that trespass could not be joined with case. The latter objection was assented to by the Court, but the opinion of the Court was, that the act complained of was a plain trespass.¹ On the other hand, where the defendant dug ditches, and so diverted the plaintiff's water out of the river and damaged the meadows of the plaintiff, an action on the case was brought; and it was moved to arrest the judgment, because it had not appeared in evidence that the diversion of the water was consequential to the digging of the ditches, and thus that trespass was the proper form. But the Court said, that the injury should be intended after the verdict to have been consequential.² So where one had a right to enter upon the yard of another, and he fixed a spout there which discharged water upon the plaintiff's land, it was held, that case, and not trespass, should have been brought, and judgment was given for the defendant.³

§ 396. The action on the case is also the proper remedy for the proprietor of a house, whom it annoyed by the continual dropping of water from an adjoining dwelling. Upon such an occasion, a feoffment was made of the new house, and the only question was, whether an action would lie against the new feoffee

¹ *Courtney v. Collet*, 1 Ld. Raym. 274; 12 Mod. Rep. 164, cited in *Woolrych*, *ut supra*.

² *Leveridge v. Hoskins*, 11 Mod. R. 257, cited in *Woolrych*, *ut supra*.

³ *Reynolds v. Clarke*, 2 Ld. Raym. 1399; also cited *ut supra*.

for a continuance of the nuisance, and the Court held that it would.¹ An action of the same nature was also held to lie against a party for continuing a bank, so as to surround the plaintiff's meadow with water. It appeared that the bank had been raised before by the feoffer of the defendant, and the Court said, that a remedy might be had against an heir under such circumstances.² According to another report of this authority, some doubt appears to have been entertained by two of the judges,³ and at length, after adjourning the case, judgment was given for the defendant, upon the ground, that *assize of nuisance*, or *quod permittat*, should have been brought.⁴ In another early case, the defendant, by erecting a new mill on his own land, flowed the plaintiff's mill; the flowing was held to be a consequence of the erection, and so case was the proper action.⁵

§ 397. In this country there seems to be no diversity as to the propriety of suing in an action on the case for the usual injuries done to or by means of a watercourse.⁶ Where case was brought by the plaintiffs as owners of certain mills, and entitled to all the stream, except what they had leased to the defendants; and the complaint was, that the defendants had

¹ Rolfe v. Rolfe, 3 Mod. R. 353, cited there in Beswick v. Combdon; S. C. cited in 5 Rep. 101, and Woolrych, 223.

² Beswick v. Combdon, Ibid.

³ Cro. Eliz. 403.

⁴ Ibid. 520.

⁵ Broome v. Mordaunt, 1 Cro. 112.

⁶ Where the defendant, says Mr. Dane, so disturbs the plaintiff in his stream or watercourse, as to occasion consequential damages, case is the proper action, in all cases where the defendant does the original act on his own land. 3 Dane's Abr. 10.

diverted more water than they had a right to take; it was held, that case was the proper form of action and not covenant.¹ In Maryland, where the action was trespass for breaking the plaintiff's close, and erecting thereon a wall, by which the plaintiff was prevented from using the water in her well, — the facts were, that the well did not belong to the plaintiff, but to the defendant, and was on the land of the latter, though the plaintiff had a right to use the water in it. It was held that the action could not be sustained, and that the plaintiff's remedy for being deprived of the use of the water was an action on the case.² In Massachusetts, if, in consequence of the opening of a sluice on land upon which the mill-owner has a right to enter, the plaintiff's land is flowed, it is considered that case and not trespass is the proper form of action.³

5. By whom to be brought.

§ 398. The tenant in possession may sue for a nuisance, even though it be of a temporary nature only, but if the nuisance be of a permanent nature, and injurious to the inheritance, the reversioner may also have an action; and both the tenant in possession, and the reversioner are respectively entitled to recover damages commensurate with the injury sustained by him.⁴ As the reversioner is bound by lapse of time

¹ *Bigelow v. Battle*, 15 Mass. R. 313.

² *Shafer v. Smith*, 7 Har. & Johns. (Md.) R. 67.

³ *Fisk v. Framingham Man. Co.* 12 Pick. (Mass.) R. 67.

⁴ Com. Dig. Tit. Action on the Case, Nuisance, B.; *Jackson v. Peaked*, 1 M. & Sel. R. 234; *Alston v. Scales*, 9 Bing. R. 3; *Baxter v. Taylor*, 4 B. & Adol. R. 72; *Bell v. Twentyman*, 1 Adol. & Ell. R. (N. S.) 766; *Davis v. Jewett*, 13 N. Hamp. R. 88; *Sumner v. Tileston*, 7 Pick. (Mass.) R. 198.

when he is knowing of an encroachment upon a privilege belonging to the inheritance, it would be great injustice not to allow him to preserve his rights by maintaining an action during the continuance of the particular estate.¹ The reversioner, it should seem, may maintain an action for any disturbance which in its present form is injurious to the possession, and which, without any further interference by the act of man, would, in the ordinary course of things, continue to be so on the determination of the particular estate.² In an action brought by a reversioner of a close against the defendant for the non-repair of a gutter running through the close to the mill of the defendant, whereby the water oozed through and carried away the soil of the close, one defence was, that the injury was the consequence of the tenant in possession of the close penning back the water and watering his meadow. Chief Justice TINDAL said, he thought this no defence, as the owner of the reversion was suing for a permanent injury to his estate, and that he could not be met with the answer, that the injury arose out of the wrongful act of the tenant, for which the defendant might have maintained an action against him. That was merely the personal act of the tenant; and it did not appear that there was any legal duty in the owners and occupiers of the close to do any act, the neglect of which, by the tenant, had occasioned the injury.³ Building a roof with eaves which discharge rain-water by a spout into adjoining premises, is an injury for which the

¹ See Ante, § 233.

² Gale & What. on Easem. 294, citing *Bower v. Hill*, 1 Bing. New R. 555.

³ *Egremont v. Putnam*, 1 Moo. & Malk. R. 404.

landlord of such premises may recover as reversioner, while they are under demise, if the jury think there is damage to the reversion.¹ A reversioner of a freehold may maintain, after a tenancy for years, an action on the case against one who erects a dam on the adjacent ground, and backs the water of the stream into the plaintiff's race.²

§ 399. If the disturbance be continued, a fresh action may be maintained by the alienee, whether he fill the situation of tenant in possession or reversioner;³ and the right of a mortgagee to commence an action, exists as soon as he takes possession of the mortgaged premises.⁴ An action may also be supported by a devisee for a continuance of the nuisance;⁵ but an action will not lie by an executor, for a nuisance done in the lifetime of the testator.⁶

§ 400. With respect to parceners, joint-tenants, and tenants in common, the two former must join in suing for injuries to real property, both in real and personal actions;⁷ but tenants in common must in general sever in real actions; though in personal actions, as for trespass or nuisance to their land, they may join, because in these actions the damages survive to all.⁸ In action for diverting a watercourse, the plaintiffs declared as

¹ *Tucker v. Newman*, 11 Adol. & Ell. R. 40.

² *Ripka v. Sergeant*, 7 Watts & S. (Penn.) R. 9.

³ *Penruddock's Case*, 5 Rep. 101; *Shadwell v. Hutchinson*, 2 B. & Adol. R. 97.

⁴ *Hatch v. Dwight*, 17 Mass. R. 289.

⁵ *Cro. Jac.* 281; 1 H. & McHen. (Md.) R. 224.

⁶ *Holmes v. Moore*, 5 Pick. (Mass.) R. 257. An action on the case for diverting water, dies with the plaintiff. *Ibid.*

⁷ 1 Chitt. Plead. 66; Bac. Abr. Tit. Joint Tenants, K.

⁸ 1 Chitt. Plead. 66; 2 Bl. R. 1077; 5 T. R. 247; *May v. Parker*, 12 Pick. (Mass.) R. 84.

tenants in common, and had shown their several titles in the declaration, when it was objected that they ought not to have joined; but the Court overruled the objection, observing that this was a matter concerning the possession, whereby the profits of the land were diminished.¹

§ 401. One tenant in common may maintain an action on the case against his co-tenant for diverting the water from their common mill, for separate purposes of his own;² and so, if one tenant in common of land upon which a mill is situated, erects a dam below on the same stream, upon his several estate, and thereby flows the common property, to the injury of his co-tenant, the latter may maintain an action on the case against him.³

6. *Against whom to be brought.*

§ 402. He who has been the author of a nuisance, is answerable for all the consequences thereof, and although after damages recovered in an action for erecting it, another action cannot be maintained for the erection, yet it may for a *continuance* of the same nuisance. The continuance of that which was originally a nuisance is, in fact, a *new* nuisance.⁴ If the

¹ *Stone v. Bromwich*, Yelv. R. 161.

² *Blanchard v. Baker*, 8 Greenl. (Me.) R. 258.

³ *Odiorne v. Lyford*, 9 N. Hamp. R. 502.

⁴ If A divert water by pipe and cock to his house, every turning of the cock is a new nuisance. Com. Dig. Tit. Action on the Case for Nuisance. *Hodges v. Hodges*, 5 Met. (Mass.) R. 205. New action may be brought for the continuance of the nuisance, and the action may be continued from time to time till the defendant is compelled to abate the nuisance. The first action is considered as a trial of the question, whether a nuisance or not, and, therefore, it is not proper, in the first instance, to give exem-

owner of the land on which the nuisance is created lets the land, an action for the continuance will lie;¹ for he who has been the author of a nuisance, cannot exonerate himself from liability therefor by alienating it and the land under it.² Where a nuisance is created by a person on his own land by obstructing a watercourse, to the injury of the land of another, and the party erecting the nuisance then conveys the premises to a purchaser with warranty, he nevertheless remains liable in an action on the case, for the damage occasioned by the continuance of the nuisance subsequent to the conveyance.³ In such cases an action for the nuisance lies, at the option of the party injured, either against the person who originally created it, or the person in possession of the premises who suffers it to continue; so that if a person erects a mill to the nuisance of another, every occupier of it afterwards, who permits a continuance of the nuisance, is subject to an action.⁴ In a case in Maryland, where the action was for diverting a watercourse, the Court were of opinion, and so directed the jury, that the action would lie against the person who diverted it, and against the

plary damages, but such only as will compensate for actual loss. But where the abating the nuisance will restore the premises to the same value and use as before the nuisance, and no real loss has been as yet sustained, the damages should be small; but if after this, the nuisance should be continued, and a new action brought, then the damages should be so exemplary as to compel an abatement of the nuisance. *Caruthers v. Tillman*, 1 Hayw. (N. C.) R. 501; *Anon. v. Deberry*, Ib. 248; *Bradley v. Amis*, 2 Ib. 399.

¹ 2 Salk. R. 460; 1 Lord Raym. R. 713.

² 8 Dane, Abr. 57.

³ *Waggoner v. Jermaine*, 3 Denio, (N. Y.) R. 206, which limits and explains the decision in *Blunt v. Aiken*, 15 Wend. (N. Y.) R. 522.

⁴ *Staples v. Spring*, 10 Mass. R. 72; *Baldwin v. Calkins*, 10 Wend. (N. Y.) R. 167; *Beidelman v. Foulke*, 5 Watts, (Penn.) R. 308.

assignee of the land, or any person who kept up the obstruction which changed the watercourse; but that no adventitious accidental advantages derived from the use of the water running in its present course, would amount to a continuance of the nuisance, without some act done to keep up the obstruction occasioning the diversion of the course of the stream; and that the present action could not be supported without showing those acts were done since the title of the land.¹ If a party buy the reversion during a tenancy, and the tenant afterwards, during his term, erects a nuisance, the reversioner is not liable for it; but if such reversioner re-let, or, having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance.²

§ 403. But as the purchaser of land might be subject to great injustice if made responsible for consequences of which he is ignorant, and for damages which he never intended to occasion or continue, it has been held ever since Penruddock's case,³ that where a party was not the original creator of the nuisance, he must have notice of it, and a *request* must be made to remove it, before any action can be brought.⁴ Where a dam was erected, and land in consequence flowed, by the grantor of an individual, the grantee will not be liable for the damages in continuing the dam and flowing the land as before, except on proof of notice

¹ Hughes v. Mung, 3 H. & McHen. (Md.) R. 441.

² Rex v. Pedley, 1 Adol. & Ell. R. 822.

³ Penruddock's Case, 5 Rep. 101.

⁴ Brent v. Hadden, Cro. Jac. 555; Pierson v. Glean, 2 Green, (N. J.) R. 36; Plummer v. Harper, 3 N. Hamp. R. 88.

of damage and of a special request to remove the nuisance.¹ But, of course, where such or any other nuisance is committed by the defendant himself, no notice or request is necessary to entitle the plaintiff to a recovery.²

§ 404. Where a nuisance is committed by several, and is a *malfeasance*, the plaintiff may sue any of those who did the wrong, and the non-joinder of the others cannot be pleaded in abatement;³ but if the parties committing the tort are joint owners of land, and the tort consisted in the *omission* of some act, which, as such owners, they are bound to perform, then all must be joined in the action, as in such case the title to the realty will come in question; that is, whether the defendants, by reason of their ownership, were bound to perform the act, for the omission of which the action is brought.⁴ If one of two tenants in common of a mill, is guilty of *malfeasance* by using it to the nuisance of a stranger, the other owner (not actually participating) is not liable. As where four persons owned a saw-mill, in the body of which three of them erected a lath-mill for their separate use, the rubbish thrown from which obstructed the mills below, the one having no interest in the lath-mill was held not liable in an action against all the owners of the saw-mill.⁵

¹ *Woodman v. Tufts*, 9 N. Hamp. R. 88; *Johnson v. Lewis*, 13 Conn. R. 303.

² *Branch v. Doane*, 17 Conn. R. 402.

³ 1 Chitt. Plead. 75; *Sutton v. Clark*, 6 Taunt. R. 29.

⁴ 1 Chitt. Plead. 76.

⁵ *Simpson v. Seavey*, 8 Greenl. (Me.) R. 138.

7. *The Declaration.*

§ 405. First, as to *allegation of title*. In an action on the case for a nuisance, the plaintiff must show in his declaration, that at the time of the nuisance, he was entitled to the estate to which the nuisance was done; as for diverting a watercourse from his mill, he must show that he was seised of the mill. But the plaintiff's possession is sufficiently set forth in his declaration, by an averment, that at the time of the commission of the tort, he was "seised in his demesne as of fee;" seised in law being sufficient, and a statement and proof of an actual *pedis possessio* is not necessary in order to maintain the action.¹ If the plaintiff allege that his father was seised and died, and a descent to himself, by virtue of which he was seised, without alleging an entry, it is enough.²

§ 406. Where the plaintiff, in an action for an obstruction to his mill, declared that he was seised and possessed of the mill, and the evidence was, that it was occupied by a tenant at will, at a rent reduced on account of the obstruction, the declaration was supported; for the possession of the tenant was the possession of the plaintiff, and the injury was consequential upon a wrong done while the plaintiff was in actual possession, and the damage was sustained by him alone.³

¹ *Hart v. Evans*, 8 Barr, (Penn.) R. 13; *Northam v. Hurley*, 22 Law Journ. R. (N. S.) 183, and S. C. 18 Eng. Law & Eq. R. 164.

² Com. Dig. Tit. "Action on the Case for Nuisance;" 3 Dane's Abr. 54.

³ *Sumner v. Tileston*, 7 Pick. (Mass.) R. 198. But Putnam, J., dissented, on the ground that the declaration was upon an injury to the possessory right to the whole mill, during the whole time set forth, and the verdict had been found accordingly.

§ 407. If the plaintiff be in possession he need not set forth his title to his premises, but declare only that he was possessed.¹ With respect to the words "was and still is possessed," the latter expression "still is," is immaterial; it being sufficient to show that the premises which have sustained the injury were in the possession or occupation of the plaintiff at the time of the damage. This point was decided in an action on the case for digging a bank. It appeared that the close, at the time of the injury, was possessed by two tenants; but at the time of the action brought, it was possessed by one only. By MANSFIELD, C. J.: "You must support your declaration by proving that when the injury was committed, the close was in the occupation of the persons mentioned in the declaration, and then you have done enough."²

§ 408. Although the plaintiff is at liberty to declare upon his possession generally, yet if he undertakes to set out a title, and does it insufficiently, the declaration is bad.³ A party appropriating water running immemorially through his land, although not enjoyed for twenty years, may maintain an action for a diversion from the ancient channel; but where he had claimed this right as the owner of a mill not twenty years old, and not in respect of land, the Court refused to allow him to amend, and he was not entitled to damages given in respect of a different right, although the right was specially found by the jury.⁴ The real ground of this decision appears to have been, that not only was

¹ 2 Ld. Raym. R. 1569.

² *Vowles v. Miller*, 3 Taunt. R. 137.

³ 1 Wms. Saund. 164 a.

⁴ *Frankum v. Falmouth*, 2 Adol. & Ell. R. 452.

the title different, but the right proved was altogether a different one from that stated in the declaration. The right proved was to the flow of the stream in its accustomed course ; in other words, as incident to the ownership of the land.¹ The right alleged was in respect of an appropriation, which, to confer a title, must have been ancient, and might have been in derogation of the natural easement, and, at all events, was totally irrespective of it.²

§ 409. It was said by Mr. J. HOLROYD, that “in cases of contract and prescription, the allegation must be proved as laid ; but that rule is not applicable to cases of tort where the right is merely inducement to the action. In this case,” he continues, “the plaintiff is entitled to judgment if he has a right of common, and that right has been disturbed by the defendant. Now he has stated a right in his declaration, and has proved the *same* right in part, by his evidence, and I think that entitles him to damages *pro tanto*.”³ This reasoning was considered to be applicable to the declaration in *Twiss v. Baldwin*, in Connecticut.⁴ It was contended in that case, that where plaintiffs set out a right to use the water according to its natural course, and *without interruption*, this was descriptive of their right and must be proved. But the Court overruled the objection, saying: Here the plaintiffs declare on a right to the use of the water without interruption ; yet they also state, that the defendants have a dam *above*, which, of course, must form some interruption. Of this, however,

¹ See Ante, § 90, § 14.

² Gale & What. on Easem. 303.

³ *Rickets v. Sawley*, 2 B. & Adol. R. 360.

⁴ *Twiss v. Baldwin*, 9 Conn. R. 291.

they do not complain, but that they have unreasonably penned and stopped the water. This unreasonable detention, then, is the burden of the complaint; and if the allegation respecting the natural course of the stream, or the right to enjoy it without hindrance or interruption, were stricken out, it would not affect the plaintiff's right to recover. ¹ WILLIAMS, J., in delivering the judgment, observes: "Is there such a variance between the proof exhibited and the allegations, that the plaintiffs cannot recover? It is said that the plaintiffs have set forth a prescriptive right; and therefore must prove it. The claim in the declaration is, that on the 28th of June, 1830, and ever since, the plaintiffs had a clock manufactory on a stream called the Harbor, and that they had a right to use and employ the water of said stream; and that the same should flow without interruption, over and through their land, and in their raceway, to their manufactory, in a convenient and customary manner, according to the natural and usual flow of said stream, and without the hindrance of the defendants or any other person. This, it is said, is a presumptive right, which must be precisely proved. The claim is to the enjoyment of the water in a convenient and customary manner; but whether this is to be proved by occupancy, or grant, or prescription, does not, and need not appear. That the right is set out as prescriptive rights formerly were,¹ or as they now are, in a plea,² will not be claimed. But, it is said that the words *currere solebat et consuevit*, are considered as equivalent to setting out a title by prescription.³ It is true

¹ Luttrell's Case, 4 Co. R. 84.

² Am. Prec. Dec. 200.

³ Surry v. Piggot, Poph. R. 171; Heblethwaite v. Palmer, 3 Mod. R. 25; Tenant v. Godwin, 2 Ld. Raym. R. 1094.

that, in support of a verdict, where these words were found in a declaration, the Court would presume that a prescriptive right was proved under them; but it does not follow that they would have been so considered, had the objection been made under a demurrer. Indeed Lord Holt, whose opinion has been relied upon,¹ held in a prescription for ancient lights, that the words *consuevit et debuit* would not be sufficient upon a demurrer. As it is now settled that bare possession is sufficient to support an action of this kind,² there is no necessity to set out a prescriptive right, for the purpose of defeating the plaintiff, by supposing a variance to exist between the allegations and the proofs. This declaration is much like the form now used in England, founded on possession, where it is intended to avoid the preciseness required in setting out a prescriptive right.”³

§ 410. A plaintiff, in an action for the diversion of water, alleged in his declaration a reversionary interest in three closes of land, to wit: *three ponds* filled with water, one pond being upon each of the said closes, and a right to the flow of the water into the said closes, for supplying the said ponds in the said closes with water for the watering of cattle; and the defendant traversed the right to the flow of the water as alleged. It appeared in evidence at the trial, that the plaintiff had enjoyed an immemorial right to the flow of this water into an ancient pond in one of his closes, but that, above thirty years ago, he made a new pond in each of the three closes, and turned the water so as to supply

¹ *Rosewell v. Prior*, 1 Ld. Raym. R. 392; S. C. 2 Salk. R. 459.

² *Anon. Cro. Car.* 499.

³ *Williams v. Moreland*, 2 B. & Cress. R. 910; *Sheers v. Wood*, 7 Moore, R. 345. And see 1 Chitt. Pl. 392.

them, and thenceforth disused the old pond, which was gradually filled with rubbish and overgrown with grass. The plaintiff's right in respect of the three ponds having been defeated by proof of an outstanding life-estate, under 2 & 3 Wm. 4, it was held, that, under the declaration, he was entitled to recover in respect of his right to the flow of the water to the old pond. "The right alleged," said PARKE, B., "is a right to have the uninterrupted flow of certain surplus water into a pond; and that right is equally proved, whether it be by prescription or lost grant, or under Lord Tenterden's Act; the declaration means no more than this, that the plaintiff has a right to the overflow of water, either in one pond, or in three ponds."¹

§ 411. In an action on the case for the diversion of a watercourse, in which it was averred in the declaration, that the plaintiff was entitled to all the water which should rise above a certain mark in a dam, and the evidence showed, that he was only entitled to the part of such water which should remain after a prior use thereof by the defendant; it was held to be a fatal variance. The plaintiff, in his declaration, should have alleged a right to the surplus water of the stream and pond after satisfying the prior right, and should have stated, as the ground of his complaint, that surplus water existed, or would have existed but for the wrongful acts complained of; and that he had been deprived of the use of such surplus water by such acts of the defendant.² So, if the course of the water is set out and described in the declaration by metes and bounds,

¹ Hale v. Oldroyd, 14 M. & Welsb. R. 789.

² Wilbur v. Brown, 3 Denio, (N. Y.) R. 356.

a variance between the statement and the proof is fatal.¹

§ 412. It being an established rule, that in an action on the case for damage to property, the plaintiff's right or interest in the property should be stated according to the facts, if the plaintiff declare as *reversioner*, the declaration must allege the nuisance to have been to the damage of his reversion, or must state an injury of such a permanent nature, as to be necessarily injurious to his reversion.² In *Jackson v. Pesked*,³ it was held, that a reversioner must set forth his interest, and allege that the damage was an injury to the reversion; it not being sufficient that the injury complained of might be of such a permanent nature as to affect the reversion. The plaintiff in that case declared as a reversioner of a yard and part of a wall, which one W. F. occupied as his tenant; and alleged that the defendant wrongfully placed on the wall quantities of bricks and mortar, and raised it to a greater height than before; and placed timbers on the wall overhanging the yard, on account of which the plaintiff lost the use of the wall, and the rain flowed from the wall on to the yard, and the yard and wall thereby became injured; but as the declaration did not allege that his reversion had been prejudiced, the Court arrested the judgment. Where the property for a portion of the time is occupied by the owner, and subsequently he has a mere reversionary interest, separate counts should be inserted.⁴

¹ *Hall v. Swift*, 6 Scott, R. 167.

² 1 Saund. 348; *Hale v. Oldroyd*, 14 M. & Welsb. R. 798.

³ *Jackson v. Pesked*, 1 M. & Selw. R. 284.

⁴ *Baker v. Saunderson*, 3 Pick. (Mass.) R. 348; *Davis v. Jewett*, 13 N. Hamp. R. 88.

§ 413. Secondly, as to the *statement of the breach*. It is a general rule in pleading, that whatever facts are necessary to constitute the cause of action must be directly and distinctly stated in the declaration ; and a party who sues for diverting water, or for creating backwater, cannot recover unless upon proving the case as stated in his declaration ;¹ but it is sufficient to describe the substance of the injury in order to give the other party notice of what he is to defend.² “It would have been sufficient,” said Mr. J. LE BLANC, “to have stated that they diverted the water above the navigation of the plaintiffs, by means of which the injury complained of happened.”³ The evidence in support of the declaration which alleged a diversion of a watercourse was, that the defendant’s son had let down the weir of a dam so that the plaintiff’s meadow was flooded, the course of the stream having been thus checked ; the learned Judge, upon this, directed a nonsuit ; and the Court sustained the opinion that the count relied on in a case of this nature ought to be so framed, as to meet the particulars of the fact more distinctly and with greater certainty.⁴ But the same degree of strictness is not always required. An action on the case was brought for diverting the water from the plaintiff’s mills ; and the obstruction laid in the declaration, was the putting a dam across the stream, and cutting above and higher in the stream than the mill, sluices, trenches, channels, &c., so that large quantities of the plaintiff’s water were thereby diverted,

¹ *Fitzsimons v. Inglis*, 5 Taunt. R. 534.

² *Bigelow v. Battle*, 15 Mass. R. 313.

³ *Mersey and Irwell Navigation v. Douglas*, 2 East, R. 497.

⁴ *Griffith v. Marson*, 6 Price, R. 1.

and the accustomed flow of the watercourse was stopped. There was a general count for turning the water out of its usual course. The evidence was, that the defendant had put down the dam in question about a mile above the plaintiff's mills, and thus had prevented the water from being regularly supplied, but that the water was not thereby diverted, because it returned to its regular course long before it reached the plaintiff's mills, and there was no waste of the water. It was proved, however, that the plaintiff had sustained injury by reason of the interruption of the regular supply; and it was upon this objected, that the mischief had been misdescribed in the declaration; for the complaint should have been, that the water had been irregularly or insufficiently supplied, or that it did not reach the plaintiff's mill at the proper time. The jury having found for the plaintiff notwithstanding, it was moved to enter a nonsuit upon the above objection, but Mr. J. BURROUGH said, that it was, in fact, stated in the declaration, that the water did not run to the plaintiff's mills as it was accustomed to run; and that the objection was merely technical, which ought not to be allowed after verdict.¹

§ 414. The general rule in cases of tort is, that it is sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved.² A and B being owners of lands and mills on the opposite sides of a watercourse, which mills were operated by the waters of such river, raised a dam across it. A brought

¹ *Shears v. Wood*, 7 Moore, R. 345.

² *Ricketts v. Seelway*, 2 B. & Ald. R. 360.

an action on the case against B for unlawfully raising the dam on his side of the river, in such a manner as to inundate B's wheel and mill. In his declaration A alleged, that he was entitled to the free course of the water of such river, and to its use for his mill, by means of the dam, free and undisturbed; and in support of this allegation, A gave in evidence an indenture, executed many years before, from which both parties derived their titles, providing, that when there should be water enough in the pond, all the mills might be improved, without let or hindrance; but when there should be want of water, the party under whom B claimed, should have the sole power of drawing the water out of his pond, for his mills, three whole days in four, and the party under whom A claimed, should have the like power, one day in four. It was held, that there was no variance sufficient to defeat a recovery by A; for the indenture proved the right alleged, either for the whole time, or for one day in four; and in either case, A was entitled to recover to the extent of the injury proved.¹

§ 415. In an action for flowing the plaintiff's land, where the defendant had the right to keep the sluices in the dam shut, except when the water was at a certain height, and he kept them shut when he should have opened them; it was held, that the plaintiff might declare generally, that the whole dam was unlawfully kept up, and recover upon showing that the *gates* only were unlawfully kept up; and that there was no variance between such proof and the declaration.²

¹ *Burdick v. Glasko*, 18 Conn. R. 494.

² *Hutchinson v. Granger*, 13 Vt. R. 386.

§ 415 *a*. As a general rule, if special damages be claimed for an alleged tort, they must be set out in the declaration as inducement, or distinct grounds, for superadded damages. But where the damages arise necessarily from the tortious act, it would seem not to be necessary to set them out; the tortious act being itself the *gravamen* of the action, and the necessarily resulting injuries being only the measure of the damages. In an action for a private nuisance for turning the course of a stream, so that it no longer flowed on the land of the plaintiff, it is an intendment of law, that the plaintiff, by the loss of the water, was thereby injured; and evidence to show that, in consequence thereof, he was compelled to haul water from a distance to supply the uses of the stream, is proper and admissible to give to the jury certain *data* upon which they may estimate the real damages, and is not claiming damages for a distinct injury not necessarily resulting from the nuisance.¹

§ 416. Where, in an action for overflowing the plaintiff's land, by a dam on the defendant's land, in which the nature and extent of the alleged injury were specially described in the declaration, it was held, that the plaintiff was entitled to verdict for nominal damages, though he failed to prove the particular injury complained of, or any other injury.² C. J. GIBSON, in giving the opinion of the Court in this case, said, — "It is said the plaintiff undertook to prove special damage, and therefore staked his case on the event. But surely an attempt to prove an injury

¹ *Hart v. Evans*, 8 Barr. (Penn.) R. 13.

² *Pastorius v. Fisher*, 1 Rawle, (Penn.) R. 27; and see *Ante*, § 133-136.

beyond what the law implies, is not necessarily a relinquishment of damages for every thing short of the whole case. When the plaintiff goes for special damage, he must lay it; else he shall not give evidence of it. But the converse of the rule does not hold,—that having laid it, he must prove it, or fail altogether. It would be neither reasonable nor just to compel him to elect between real and nominal damages; or to refuse compensation as far as a substantial cause of action has been proved.”

§ 417. It is usual in declarations to insert several counts, varying the matters charged against the defendant.¹ There may be one count alleging a general diversion of the water, without showing the means; another for widening cuts from the stream, &c.;² and a count for keeping the banks of a river in repair, is said to be proper in order to avoid a risk, namely, of not being able to show that the defendant made the cuts or channels stated in the first count.³ Perhaps, too, there may be a right in the defendant to irrigate his fields at certain seasons of the year. It is advisable to insert a qualification or exception to this effect in a separate count; and care should be taken to preserve the exceptive statement throughout the count.⁴ With respect to the *continuando*, it is customary to allege it, with the words “kept and continued, or caused to be kept and continued.” There is a case which shows the difference, in this respect, between the action of trespass, and the action on the case for a

¹ See Forms of Declarations in the Appendix.

² Ibid.

³ Woolrych, 319; 1 Chitt. Pleading, 392, 393.

⁴ Ibid.

nuisance. Upon executing a writ of inquiry of damages in trespass for digging a hole in the plaintiff's soil, whereby his land was overflowed — continuing the trespass for nine months — it was insisted, that evidence might be given of a consequential damage after the nine months, as well as in the case of a nuisance which continues for nine months, where, the cause being removed, the effect nevertheless continues. But HOLT, C. J., would not agree to this, observing, that, in case of a nuisance, the damage is the gist of the action; but that in trespass the tort was the material point, and he doubted whether an action would lie for the continuance of a trespass as of a nuisance.¹

§ 418. Thirdly, as to *venue*. An action on the case for a nuisance, is a *local* action, so that the nuisance must be proved to have been done in the county where the *venue* is laid;² unless, indeed, there was some *contract* between the parties upon which to ground the action.³ A plaintiff declared, that he was possessed of a dwelling house in the county of Surry, and that the defendant possessed a shop contiguous, and a wooden spout affixed thereon, &c.; which spout it belonged to the defendant to keep in such repair that no injury should happen to the plaintiff's dwelling house; and he alleged that the defendant suffered the spout to be out of repair, to wit, at Westminster, in the county of Middlesex, whereby the rain-water soaked through the

¹ Case of the Farmers of Hampstead Waterworks, 12 Mod. R. 519.

² Sumner v. Finegan, 15 Mass. R. 284.

³ 1 Chitt. Pl. 268. "Actions," says Chitty, "though merely for damages, occasioned by injuries to real property, are *local*, as trespass, or *case for nuisances*, or waste, &c., to houses, lands, watercourses, right of common, ways, or other real property."

spout, &c. The premises were proved to be in Surry. MANSFIELD, C. J.: "On reading the declaration, it at first appeared to me, that the *vide licet* in the county of Middlesex, as applied to a house or any thing else in Surry, in its nature local, is nonsense, and a contradiction in terms. And, upon consideration, the true sense appears to be this: it is the description of the house, a local object, which it states to be in Middlesex, and consequently the objection must prevail. If this is not a description of the place where the defendant's house is situated, there is no description of it; and if no place is alleged in the declaration, it must be intended that the house lies in the county in which the nuisance is alleged to be committed, which is Middlesex. Therefore, *quacunque via data*, the declaration is not supported."¹

§ 419. But the nuisance may be proved to have been done at any place within the county, although a particular town of the county is mentioned in the declaration. The case wherein this was determined, is the Proprietors of the Mersey and Irwell Navigation *v.* Douglas.² In this case, the plaintiff declared, "that the defendant, at Preston, in the county aforesaid, erected, &c., above the said navigation of the said company, a certain weir or dam, and wrongfully and injuriously kept and continued the same, *so there* erected, for a long space, &c." At the trial, at Lancaster, the plaintiffs were nonsuited for default of proving that the river Irwell was at Preston; and a rule *nisi* was obtained for setting aside the nonsuit,

¹ Warren *v.* Webb, 1 Taunt. R. 379.

² East, R. 497.

and granting a new trial. Lord ELLENBOROUGH, C. J.:
“This action is in its nature confessedly local; but the question is, whether the gravamen need be described with any local certainty; and I incline to think it need not, but that it is sufficient if it be laid at any place within the body of the county. A plaintiff, in such an action, may indeed make it necessary to prove the gravamen in a particular place, by giving it a specific local description; as by alleging the nuisance to be standing, and being at a certain place particularly described; but in general, such particularity is not necessary. For otherwise, how is a venue to be laid to the fact of the obstruction, when that takes place in the higher part of a stream, flowing in one county, and the injury is sustained in the lower part of the same stream in a different county, in which the action is brought? It is sufficient to describe the substance of the injury, in order to give the other party notice of what he is to defend; and it is sufficient in the form of pleading, to allege the gravamen at any place within the body of the county. Therefore, the manner in which it is here stated, ought rather to be referred to venue than to local description.” LAWRENCE, J.:
“The gist of the action is, that the defendants erected the weir *above* the plaintiff’s navigation, by means of which their navigation was obstructed. It is quite immaterial *where* it was erected above the navigation. It would have been sufficient to have stated that they diverted the water above the navigation of the plaintiffs, by means of which the injury complained of happened. Neither is it necessary, in actions of this kind, to give a local description either to the property injured, or to the thing which caused the injury; but it is sufficient to state what the property injured was,

and that it was so injured by the defendants. In this case, therefore, it was not necessary to prove that the river Irwell, or any part of it, was within the town of Preston; or that the weir, by which the obstruction was caused, was within the same place; but the whole may be referred to matter of venue."

§ 420. Where, however, an injury has been caused by an act done in one county, to land, &c., situate in another, the *venue* may be laid in either.¹ The law to be collected from Bulwer's case is decisive upon this point:—"When one matter in one county is depending upon the matter in another county, the plaintiff may choose in which county he shall bring his action." "As if a man will not repair a wall in Essex, which he ought to repair, and for which cause my land in Middlesex is drowned, I may bring my action in Essex, for there is the defendant's fault, or in Middlesex, for there is the damage."² If a trench made in the county of N. causes the plaintiff's land to be inundated in the county of W., although a statute requires all actions to be brought and tried in the county where the cause of action arises—the action may be brought and tried in the county of W.³ The case of *Thompson v. Crocker*, in Massachusetts,⁴ was for flowing back the water upon the plaintiff's mills in the county of Plymouth, by a dam which was in the county of Bristol, and it was supported in the county of Plymouth. But both in

¹ 1 Chitt. Pl. 269; Com. Dig. Action, N. 3, 11; 3 Leon, R. 141. So where an action against a sheriff arises partly from matter *in pais* in different counties, the plaintiff may bring his action in either county, at his election. *Marshall v. Hosmer*, 3 Mass. R. 22.

² Bulwer's Case, 7 Rep. 1.

³ Sutton v. Clark, 6 Taunt. R. 29.

⁴ *Thompson v. Crocker*, 9 Pick. (Mass.) R. 59.

this case and the one immediately preceding it, the action, according to Bulwer's case, could have been maintained in either county; and it has, moreover, been expressly held, that where an injury to a fishery in the county of Plymouth is occasioned by an obstruction to the passage of fish erected in the county of Bristol, the owner of the fishery may bring his action in either county.¹

§ 421. It has been asserted, that analogous to the cases cited in the preceding section, is the wrong done by stopping the flow of the water by any obstruction or drain in one *State*, to the injury of a mill in another State; and that, "in a just sense, the wrong may be said to be done in both States."² But though it may be true that a wrong done in one State, injuriously affecting property situate in another State, is, in a just sense, a wrong in both; yet how stands the law as regards the *remedy*? The question is not one of *venue*, but of *jurisdiction*. It is hardly necessary to point out the difference there is, as regards actions and suits, between the relation of *counties* in the same State, and the relation between two distinct and independent States. Actions for injuries done to the *freehold*, as for diverting water or flowing land, are by the Common Law *local*, because they arise out of a local right or interest, and, therefore, cannot be prosecuted in the Courts of another State. It has been accordingly decided by the Supreme Court of New York, that an

¹ *Barden v. Crocker*, 10 Pick. (Mass.) R. 388. See likewise *Oliphant v. Smith*, 3 Penn. R. 180.

² Per Mr. J. Story, in *Slack v. Walcott*, 3 Mason, (Cir. Co.) R. 508, and cited more fully Ante, § 167.

action, will not lie for an injury done by the diversion of a watercourse, where the premises injured are situate in *another* State; that the injury so far savors of an injury to the realty, as to be classed with *local* actions; and though the Courts of New York will entertain actions which are in their nature *transitory*, notwithstanding they arise *abroad*, they will not do so as to actions which are in their nature *local*. The action in this case was an action on the case in the Superior Court of the City of New York, for diverting the water of a stream from the mill of the plaintiffs, situate at Newark in the *State of New Jersey*. The action, the Court said, "stood on a footing with real and mixed actions, such as trespass *quare clausum fregit*, ejectment, waste, &c., where, if the lands lie in a *foreign* country, they cannot be tried here."¹ This judgment was affirmed by the Court of Errors, in which Chancellor WALWORTH, in delivering his opinion, said, — "Several cases were referred to from the decisions of the Court of Chancery in this country and in England, by the counsel for the plaintiffs, upon the argument, to show that bills have been filed to reach property beyond the jurisdiction of the Court, where the person of the defendant was within its jurisdiction. These are founded, however, upon the well-established principle that the Court of Chancery has power to give relief wherever there is a clear case of right, for which the Common-Law tribunals cannot give an adequate remedy. And they afford no ground for the extension of the jurisdiction of a Common-Law

¹ *Watts's Adm'rs v. Kinney*, 23 Wend. (N. Y.) R. 484.

Court to a case which is clearly not within its known and established jurisdiction."¹

8. *Pleas.*

§ 422. In pleading to an action on the case, for a nuisance, the general issue is, "not guilty;" under which every thing, that shows that the defendant did what he might lawfully do, may be given in evidence. Hence the defendant may prove that the plaintiff gave permission to do the act which occasioned the nuisance, and that it was done under his permission; for many matters, by modern practice, may thus be given in evidence that the party formerly was obliged to plead specially.² In this respect, there is a difference between actions of trespass and actions on the case. The former are actions *stricti juris*, and therefore a former recovery, release, or satisfaction cannot be given in evidence, but must be pleaded. But an action on the case is founded upon the conscience and justice of the plaintiff's case, and is in the nature of a bill in equity. Therefore a former recovery, &c., need not be pleaded, but may be given in evidence. Whatever will in equity and conscience, according to the circumstances, preclude the plaintiff from recovering, may, in an action on the case, be given in evidence by the defendant; because the plaintiff must recover upon the justice of his case only.³

§ 423. In an action for diverting a watercourse, the

¹ Watts, &c. *ub. sup.*, as reported in 6 Hill, (N. Y.) R. 82. For distinction between actions *local* and actions *transitory*, see *Mostyn v. Fabrigas*, Cowp. R. 161, with notes, 1 Smith, Lead. Ca. 340.

² 2 Peake's Ev. 294; 3 Dane's Abr. 56; 1 Chitt. Pleading, 486.

³ 2 Burr. R. 1853.

defendant pleaded, that all the water sprung in his own ground; that certain pits, mentioned in the declaration, had been there immemorially for the benefit of the meadows and cattle; and that the pits, being choked up with mud, he dug other pits, and made dams and banks, &c.; and the defendant thereupon denied that any other ponds had been obstructed. The plaintiff, protesting that this plea amounted to the general issue, replied *de injuria*, concluding with an averment, upon which the defendant demurred. The Court held, that the plea amounted in reality to a confession of the plaintiff's action, and that the plaintiff could not conveniently take issue on such a plea. The defendant, in point of fact, had claimed a right to keep out all the water, if he pleased, and thus had done no more than plead the general issue; inasmuch as if the case had gone to trial, and it had appeared that the defendant had this exclusive right, there must have been a nonsuit. The course which the defendant should have pursued, ought to have been to deny the plaintiff's right.¹

§ 424. If a defendant in one plea claim to have water flow from a mill-stream to a ditch at all times, and in another plea claim the right only at the time of flashes, and the jury find the right in his favor at all times, the Judge will discharge the jury as to the claim at the time of the flashes.²

§ 425. One prescription cannot be pleaded against another, without a traverse; and a mistake in this respect is in some degree similar to that in the authority

¹ *Brown v. Best*, 1 Wilson, R. 174.

² *Drewett v. Sheard*, 7 Car. & Payne, R. 456; and 32 Eng. Com. Law R. 585.

just cited. Where the plaintiff had set out a title in his declaration, the defendant, by his plea, set forth another prescription for the convenience of watering his cattle, and the plaintiff demurred generally. The plea was adjudged to be bad, because it neither confessed nor avoided the declaration, nor yet traversed the matter therein alleged.¹ In this case, it was holden by the Court, that if, upon the general issue pleaded, it had been proved that the water did not always run to the plaintiff's house, but that it was usually dried up in the summer, or drank up by the defendant's cattle, the plaintiff would have failed in his prescription.² It follows, then, that great accuracy is requisite in setting forth a prescription.³

9. *Evidence.*

§ 426. In an action on the case for a nuisance committed to, or by means of, a watercourse, the plaintiff is of course bound to prove his possessory, or reversionary interest; and in the next place he must prove the act or omission of the defendant, as stated in the declaration.⁴

§ 427. The plaintiff has, moreover, to prove the damage resulting to his right; and here arises the important question, whether he must show some positive, actual, or *special* damage. In an action for the obstruction of a *way*, to the use of which the plaintiff was entitled, it was held to be sufficient to prove the obstruc-

¹ *Murgatroid v. Law*, Carth. R. 116.

² *Ibid.*

³ *Ibid.*

⁴ 3 Stark. Ev. 991; 1 Chitt. Pl. 381, 392.

tion, without showing that any special damage had been occasioned by it.¹ But in *Williams v. Morland*,² the Court make a distinction, in relation to this point, between a way and a watercourse. In the case of an action for the obstruction of a way, or of a right of common, it was admitted that such obstruction was a sufficient cause of action; but generally speaking, in the opinion of the Court, there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle the person complaining to maintain an action on the case. Water, the Court thought, was of that peculiar nature, that it was not sufficient to allege in a declaration, that the defendant prevented the water from flowing to the plaintiff's premises; but the plaintiff must state an actual damage, accruing from the want of the water. The mere right to use the water, to adopt the words of LITTLEDALE, J., "does not give a party such a property in the new water constantly coming, as to make the diversion or obstruction of the water, *per se*, give any right of action." But Lord C. J. DENMAN, in concluding his judgment in *Mason v. Hill*,³ says,—"It must not be considered as clear, that an occupier of land may not recover for the loss of the *general benefit* of the water, without a special use or special damage shown;" and the learned Judge cites *Palmer v. Kibblethwaite*,⁴ and *Glynne v. Nicholas*.⁵ In the first of those cases it was argued for the plaintiff,

¹ *Allen v. Ormond*, 8 East, R. 4.

² *Williams v. Morland*, 2 B. & Cress. R. 908.

³ *Mason v. Hill*, 3 B. & Adol. R. 312, and cited more fully *Ante*, § 133.

⁴ *Palmer v. Kibblethwaite*, 1 Shower, R. 64, (often cited *Heblethwaite*,) Skinn. R. 65.

⁵ *Glynne v. Nicholas*, 2 Show. R. 507.

that the stream *being the plaintiff's*, the defendant could not divert it; and the Court said, that an action had lain for the diversion of a watercourse, though no mill had been erected. Indeed, to take away from a lower riparian proprietor the natural advantages of the water, (whether he has a mill or not,) and the fertility imparted by it to the soil, even when unapplied, without conferring a right of action, would be contrary both to the spirit and letter of the law.¹ One of the reasons which has been assigned for granting an injunction against diverting a watercourse, was, that it must be painful to any one to be deprived at once of the enjoyment of the stream which he has been accustomed to see flow by the door of his dwelling;² and, as has been held by the Supreme Court of North Carolina, every riparian proprietor necessarily and at all times is using the water running through it, — if in no other manner, in the fertility it imparts to his land, and the increase in the value of it. But the existence of a particular application of the water for hydraulic purposes, of course measures the amount of the damages incurred by the wrongful act of another.³

§ 428. Independently, however, of the view taken in the foregoing section, and assuming that no actual damage is shown to arise from the diversion of a watercourse, or of throwing the water back upon land above, an action may be maintained on the ground that an undisturbed enjoyment or continuation of such acts, without the express consent of the owner of the land,

¹ *Mason v. Hill*, *ub. sup.*

² *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. R. 162.

³ *Pugh v. Wheeler*, 2 Dev. & Bat. (N. C.) R. 50.

would ripen into evidence of a right to do them.¹ "Wherever any act," says Mr. Sergeant Williams, "injures another's right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for the invasion of the right without proof of any special injury, and this seems to be a governing principle in cases of this kind."² In *Hobson v. Todd*,³ in which an action was brought by a commoner, who had himself surcharged against a stranger for putting his beasts on the common, it was held he might recover; and it being objected that the plaintiff had shown no damage, BULLER, J., said, — "There is also another ground on which this action may be supported, which is, that *the right has been injured*; and if a commoner cannot sustain such an action as this, because his cattle had grass enough, he must permit a wrongdoer, like the defendant, to gain a right by length of possession." GROSE, J., likewise said, — "I am not inclined to encourage this action on any other ground than that mentioned by my brother Buller, namely, that if A infringe the right of common of B, it is necessary that B should have A's right ascertained; otherwise his wrongful act would, in process of time, become evidence of his right."⁴ Case lies, on the same principle, by one having a right of *way* against an intruder, without proof of actual damage, on the ground that the *right* has been injured.⁵

¹ See Ante, Chap. VI., and *Young v. Spencer*, 10 B. & Cress. R. 145.

² 1 Wms. Saund. 346 b.

³ *Hobson v. Todd*, 4 T. R. 71.

⁴ In the subsequent case of *Pindar v. Wadsworth*, 2 East, R. 158, it was determined, that a commoner may maintain an action for an injury done to the common, though his proportion of the damage amount only to a *farthing*.

⁵ *Williams v. Esling*, 4 Barr, (Penn.) 486. In a declaration in case,

§ 429. The rule established by the above cases is unquestionably applicable to watercourses ; to the diversion of it, to the causing it to flow back upon land of others above, and to the right of fishery therein. If the owner of land on one side of a watercourse extends a mill-dam across the river without the permission of the proprietor opposite, it is an adverse and injurious invasion of the rights of the opposite proprietor, although he has no occasion to make any use of the water ; because if the dam be continued a sufficient length of time, the law will presume a grant to abut the dam on the opposite side.¹ In *Parker v. Griswold*,² the plaintiff, in an action on the case for the diversion of a watercourse, alleged that the defendants diverted the water out of its natural course, and away from the land of the plaintiff, and prevented the stream from flowing to the land of the plaintiff, as it otherwise would have done, and that the plaintiff could not in consequence use his land in so large and beneficial a manner as he might and otherwise would have done, but was thereby, during the said time, deprived of the use and enjoyment of his said land, and all the benefits

it was stated that the defendants being possessed of a messuage adjoining a garden and messuage of the plaintiff, placed a cornice upon his messuage projecting over the plaintiff's garden, by means whereof quantities of rain flowed from the cornice on to the garden, and did damage ; and by reason of the premises, the plaintiff had been greatly annoyed and incommoded in the use, possession, and enjoyment of his garden and messuage, and the same were damaged and deteriorated in value. It was held, that the projection in itself was a nuisance, from which the law inferred a damage, and that the plaintiff was entitled to maintain his action in respect of that alone, even though no rain had fallen. *Fry v. Prentice*, 14 Law Journ. (N. S.) C. P. 298, thus cited in 5 Harr. Dig. 314.

¹ *Bliss v. Rice*, 17 Pick. (Mass.) R. 23.

² *Parker v. Griswold*, 17 Conn. R. 288.

and advantages which he otherwise might and would have derived from said land. It was held, that a sufficient cause of action was shown, although the declaration did not aver the existence of any mill, or other works of the plaintiff on his land for the operation of which the water so diverted was needed.¹

§ 430. So where an individual constructs a dam so as to flow backwater on the land of another person, it is a presumption of law that the act is a damage, and no special damage need be proved to sustain a suit.² Thus, where A brought an action against B for flowing back the water of the river Presumpscott, to the injury of his riparian rights, it was held, that if the plaintiff could prove that the natural flow of the stream was changed by any person not having a legal right to

¹ A, in the year 1798, conveyed to B a parcel of land bordering on a watercourse, with liberty to B to use the water to operate his mill, or any other use he might see cause to put it to, at any time when it ran over the grantor's dam above. B occupied the premises so conveyed, and used the water to operate his mills until July, 1843. In an action then brought by B against C, the owner of a mill privilege below, for raising the water, by means of a permanent dam, and thereby setting it back upon B's works, it was held, first, that whether B's right to use the water was, under his deed from A only a qualified right, or not, C having no right or license to do the acts complained of, had thereby violated the right of B, for which B was entitled to a recovery; and, secondly, that for this purpose, it was not necessary for B to prove any specific actual damage resulting therefrom. Whether the plaintiff, when those acts were committed by the defendant, was interfering with the rights of his grantor, by using the water, when it did not run over his dam, was an inquiry, the Court held, not competent for the defendant to make; and as the defendant claimed no right under the said grantor, he was as to the plaintiff a wrongdoer. The Court considered no principle to be better settled, than that as against a wrongdoer, actual possession, in an action of this description, was a sufficient title for the plaintiff to maintain an action. *Branch v. Doane*, 18 Conn. R. 233, and 17 Ibid. 402.

² *Woodman v. Tufts*, 9 N. Hamp. R. 88; *Pastorius v. Fisher*, 1 Rawle, (Penn.) R. 27.

change it, he might recover nominal damages, although no actual injury had been occasioned.¹

§ 431. The drawing of a seine in the several fishery of another, although no fish be taken, entitles the owner to damages, merely on the ground, that a repetition of such acts, if acquiesced in for twenty years, would deprive the owner of his rights.²

§ 432. It may, in short, be said to be an elementary principle of law, that wherever there is a wrong there is a remedy to redress it, and that every injury imports damage in the nature of it ; and that if no other damage be established, the party injured is entitled to nominal damages. This principle, moreover, applies more strongly where there is not only a violation of the plaintiff's right, but the defendant's act, if continued, may become the foundation, by lapse of time, of an adverse right, and hence actual perceptible damage is not indispensable as the foundation of an action. And with regard to the rights of riparian proprietors on a watercourse, it is abundantly well established, that the law tolerates no further inquiry than whether there has been a vio-

¹ *Whipple v. Cumberland Manufac. Co.* 2 Story, (Cir. Co.) R. 661.

² Per Sherman, J., in *Chapman v. Thames Man. Co.* 13 Conn. R. 269. In the case of *Patrick v. Greenway*, tried before Mr. Justice Lawrence at Oxford Spring Assizes, 1796, which was an action of trespass for fishing in the plaintiff's several fisheries, it appeared in evidence, that the defendant fished there, but did not take any fish; neither was it alleged in the declaration, that the defendant caught any fish. The plaintiff obtained a verdict, which, in the following term, Easter, 1796, the defendant moved to set aside; but the Court of Common Pleas refused even a rule to show cause, upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of the using and exercising of the right by the defendant, if such an act were overlooked. 1 Wms. Saund. b. note to *Mellor v. Spateman*.

lation of right. If that appears, the party injured is entitled to nominal damages at least.¹

§ 433. The defendant may show, in mitigation of damages, in an action for the diversion of a watercourse, that the diversion was rather a benefit than an injury to the plaintiff; or that it was made in virtue of a verbal agreement between the plaintiff and the defendant; or that the plaintiff entered into such agreement with the defendant with a view of extorting money from him; or for showing that the defendant was not a wrongdoer *ab initio*.² And so in an action for overflowing the plaintiff's land.³

§ 434. In an action for the continuance of the diversion of a watercourse, or of any nuisance done to or by means of a watercourse, the verdict and judgment for the plaintiff in a former action, in which the same matter was in controversy between the parties, may be given in evidence as conclusive; and that the defendant has discovered new evidence, not in his power at a former trial, forms no exception to the rule. But, in order to avail himself of this conclusiveness, the plaintiff must be careful not to waive it by pleading; as if the defendant should plead a license, and the plaintiff in his replication does not rely on the estoppel of the

¹ See *ante*, Embrey v. Owen, note at the end of § 129; Webb v. Portland Manuf. Co. 3 Sumn. (Cir. Co.) R. 189; Bolivar Manuf. Co. v. Naponset Manuf. Co. 16 Pick. (Mass.) R. 241; Crooker v. Bragg, 10 Wend. (N. Y.) R. 260; Baldwin v. Calkins, Ibid. 167; Butman v. Hussey, 3 Fairf. (Me.) R. 407; Blanchard v. Baker, 8 Greenl. (Me.) R. 253; Ripka v. Sergeant, 9 Watts & S. (Penn.) R. 9; Hulme v. Shove, 3 Green, (N. J.) R. 116; Welton v. Martin, 7 Missouri R. 307; and see *Ante*, § 135; Northum v. Hurley, 18 Eng. Law & Eq. R. 104; 12 Maine, R. 407.

² Addison v. Hack, 2 Gill, (Md.) R. 221; and see also *Ante*, § 288, *et seq.*

³ McKellip v. McIlhenny, 4 Watts, (Penn.) R. 317.

former judgment, but replies, no license; the jury, in such case, are not precluded from inquiring into the exact truth of the case.¹

§ 435. Though a jury, on the trial of an action for the continuance of a nuisance, by diverting or obstructing water, and overflowing land, should give damages for a little longer time than they ought, yet this is no ground for a new trial, if the plaintiff offers to remit such part of the damages as has been wrongly assessed.²

§ 436. Where the plaintiff complains of an hindrance to an *acquired* privilege of obstructing or diverting the water, it will be incumbent on him, unless he can show an express grant, to carry his evidence of the enjoyment of the privilege as far back as possible, in order to raise the presumption of right by grant.³ It has been shown that, in general, the uninterrupted enjoyment of water, in any particular manner, for the period limited by the act of limitation for the right of entry upon land, is equivalent to a grant.⁴ When a right is thus claimed, the evidence must go to show an exercise of the right by the occupier of the land to which it is represented as being appurtenant. The defendant, in answer, may show that the use has been by mere favor, or any thing to counteract the effect which the enjoyment unexplained would produce.⁵ The defendant may

¹ *Kilkeffer v. Herr*, 17 S. & Rawle, (Penn.) R. 319.

² *Hodges v. Hodges*, 5 Met. (Mass.) R. 205.

³ 1 Peake's Ev. 294.

⁴ See Ante, § 200, *et seq.*; *Belknap v. Trimble*, 3 Paige, (N. Y.) Ch. R. 577.

⁵ See Ante, § 220 – 222. The plaintiff, being possessed of a house and land in E., had, for sixty years, exercised rights of common in W. It appeared that this was done near the boundary of the two commons of W. and E., which lay open and uninclosed, and adjacent to each other; that

show, in answer, that the enjoyment was by connivance or consent of one who has had only a temporary interest in the estate out of which the easement is claimed; and this will avoid the right which might otherwise arise.¹

§ 437. In an action for diverting a watercourse, a person claiming a right to the use of the water, is not admissible as a witness, to prove the course of the stream.² But where the plaintiff, owner of a mill, carried on business in it in company with another person, and agreed to make a deduction in the rent, on account of back-water, occasioned by the defendant's dam; it was held, that in the action brought by the plaintiff to recover damages for the obstruction, such other person was not interested, and therefore was a competent witness.³ And in an action for obstructing the course of the water, by one of two grantors against the grantee, in which the construction of the deed came in question, it was held, that the other grantor was a competent witness to establish a collateral fact, as to the situation of the premises at the time of the grant.⁴

§ 438. In an action for a nuisance in the erection of a mill-dam, which overflows the plaintiff's land, his declarations, and those of any former owner of the land,

the parties exercising the right, did not, at the time, know the exact boundary; and that the plaintiff had, on the previous inclosure of the common at E., obtained an allotment there in respect of his estate. Held, that it was properly left to the jury to say, whether the evidence was referable to an exercise of the right in E., and a mistake of the boundary, or to an exercise of the right in W. *Hetherington v. Vane*, 4 B. & Ald. R. 428.

¹ See Ante, § 216, *et seq.*; and *Wall v. Nixon*, 3 Smith, R. 316.

² *Jebb v. Povey*, 1 Esp. R. 679.

³ *Sumner v. Tileston*, 7 Pick. (Mass.) R. 198.

⁴ *Baker v. Sanderson*, 3 Pick. (Mass.) R. 348.

made when he was the owner, respecting the defendant's right so to do, may be given in evidence, in proof of an executed license, which as has been shown, is, in equity, not countermandable.¹

§ 439. A former judgment may be given in evidence. In an action for the continuance of a nuisance, it has been adjudged in Pennsylvania, that a verdict and judgment for the plaintiff in a former action, in which the same matter was in controversy between the parties, are conclusive evidence ; and that the defendant had discovered new evidence, not in his power at a former trial, formed no exception to the rule at law or in equity. But in such action, the plaintiff, to avail himself of this conclusiveness, must take care not to waive it by pleading ; as, if he plead a license, and the plaintiff does not, in his own replication, rely on the estoppel of the former judgment, but replies, no license, the jury are not precluded from inquiring into the truth of the case.²

10. *Actions of Covenant and Assumpsit.*

§ 440. We have thus treated of the remedy by the action of *trespass on the case*, for injuries done *to*, or *by means of*, a watercourse, as the proper and ordinary remedy in such cases ; but the circumstances of a case may be such as to warrant an action of *covenant*.³ It was held in a case, concerning a watercourse, that the

¹ McKellip v. McIlhenny, 4 Watts, (Penn.) R. 317. See Ante, § 318 - 326.

² Kilheffer v. Herr, 17 S. & Rawle, (Penn.) R. 319.

³ As to covenants *running with the land*, see Ante, § 256 - 273 ; and see Kinney v. Watts, 14 Wend. (N. Y.) R. 38.

devisee of an equity of redemption, (the legal estate being in a mortgagee,) was not liable in covenant, as assignee of all the estate and right of the original covenantor.¹ In another case, an action of covenant was brought by a reversioner against an assignee of the grantee: and the declaration stated, that A and B did grant a license for a term of years to C, to continue a channel open through the bank of a navigation, in order that the waste water might pass through the channel to the mills of C; the latter paying a certain annual sum therein mentioned. The breach assigned was the non-payment of that annual sum. The grant for a term of years, of an interest in any such incorporeal hereditament, the Court thought might operate as the grant of an interest within the 32 Hen. VIII, so

¹ The facts of the case were as follows:—The Corporation of Carlisle sued the defendants in covenant, for that G. D. had bargained and sold to them, for certain considerations, so much of the river Caldew running through his land called D'Holme, as should be sufficient for the grinding of corn at all times at the city mills. There was a covenant that G. D., &c. should not divert or obstruct any part of the water so granted. It was then alleged, that all the estate, right, &c. of G. D. in the said lands, &c., came to and vested in the defendant by assignment. The breach was, that the defendant had erected a weir across the river-Caldew, near the city mills, higher up the stream, and so had diverted the water, whereby the mills had become less serviceable. The defendants, amongst other pleas, said that the estate did not come to them by assignment, &c. It was objected on their behalf, at the trial, that the action was improperly brought against them as assignees of all the estate, &c., of G. D., the same being vested in one W., as mortgagee in fee, while the defendants were only seised of the equity of redemption, as devisees in trust, under a will. The learned Judge, being of opinion that the plaintiffs had failed in their averments, directed a nonsuit, and the Court of King's Bench confirmed his opinion. They held it to be clear, that the devisees of an equitable estate, (the only character to be ascribed to the defendants upon the record,) could not be liable to an action of covenant as assignees. *Mayor, &c. of Carlisle v. Blamire*, 8 East, R. 487.

as to make the assignee of the grantee liable to an action for a breach of covenant, brought by the reversioner.¹

§ 441. Where tenants in common of a watercourse and dam, and of several mills depending for water upon such dam, made partition, by which some of the mills were apportioned to each ; and each of the parties covenanted with the other to keep in repair distinct and separate portions of the dam ; it was held, that *case* for not repairing would not lie by one of them against the grantee of the other, and that *covenant* was the proper remedy.²

§ 442. The breach of covenant charged in the declaration, in an action of covenant, being that, during a specified period of time, the defendant deprived the plaintiff of the water necessary for his mill, by diverting it therefrom, the plaintiff is not limited in proving acts committed by the defendant, to the period stated in the declaration ; but he may prove previous acts, in consequence of which the injury was sustained during that time.³

§ 443. The circumstances may be such as to warrant also an action of *assumpsit*, for the use and occupation

¹ Portmore (Earl of) *v.* Bunn, 1 B. & Cress. R. 694. But in this case, by the deed produced in evidence, A and B were described as persons having the greatest proportion of share in the profits of the navigation ; and by this deed it appeared, that the grantor had not the power of granting the privilege, of which the deed as set out in the declaration purported to be a grant, and therefore there was a variance. Held, also, that the deed showed that the assignee of the grantee was not bound by the covenants, inasmuch as it appeared that the grantors had not any legal or equitable estate in the real hereditament, which the deed set out in the declaration purported to grant.

² Wilbur *v.* Brown, 2 Denio, (N. Y.) R. 356.

³ Hollingsworths *v.* Dunbar, 5 Munf. (Va.) R. 199.

of a watercourse and the water running therein.¹ Where a contract respecting the use of water, under seal, has afterwards been varied in the terms of it by a distinct simple contract, made upon a sufficient consideration, such substituted or new agreement must be the subject of an action of assumpsit, and not of an action of covenant; and where several things unconnected with a deed are, with other stipulations in a deed, afterwards made the subject of a parol contract, assumpsit may be sustained by the breach of it.² An action of assumpsit, founded on a contract under seal, respecting water power, which contract was afterwards altered and modified, and in other respects confirmed, by a contract not under seal, it has been expressly held, was properly brought.³

11. *Equitable Remedies.*

§ 444. It is well established that Courts of Equity have concurrent jurisdiction with Courts of Law, in cases of private nuisances; and the interference of the former by injunction, is founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing a multiplicity of suits.⁴ They will, as a general rule, interfere in those cases of private nuisance only, where the right of the party complaining is clearly established, and the injury which he must necessarily

¹ Davis v. Morgan, 4 B. & Cress. R. 8, and fully cited Ante, § 278.

² 1 Chitt. Pl. 105.

³ Mill-Dam Foundery v. Hovey, 21 Pick. (Mass.) R. 417. For the facts and circumstances attending this case, see Ante, § 274.

⁴ 2 Story, Eq. Jurisp. 925, et seq.; Eden on Injunct. 268, (Am. Edit. 1839.)

sustain, if the work be allowed to proceed, is of such a nature that no adequate compensation can be afforded by damages only, and when, says Sir Thomas Plummer, "delay itself would be a wrong."¹ "The leading principle," said Lord Brougham, "on which I proceed in dealing with this application — the principle which I humbly conceive, ought, generally speaking, to be the guide of the Court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur — is, that such a restraint should be imposed as may suffice to stop the mischief complained of, and where it is to stay injury, to keep things as they are for the present."² Past injuries are in themselves no ground for an injunction, — the province of the injunction being to prevent future mischief, and not to afford, for instance, a remedy for a past diversion of water. If the injuries by diversion are continued, or the right to continue them set up and persisted in by the defendants, in a bill for an injunction, a Court of Equity, if the facts be properly established, will interfere effectually to protect the complainants.³

§ 445. Cases of the obstruction of watercourses, the diversion of streams from mills, back-flowage, &c., have long been regarded in England as of a nature calling for the remedial interposition of a Court of Equity.⁴

¹ In *Winstanley v. Lee*, 2 Swanst. Ch. R. 336.

² *Blakemore v. Glamorganshire Canal Navigation*, 1 My. & Keen, Ch. R. 185.

³ *Society for Establishing Manufactures v. Morris Canal Co.* 1 Saxton, (N. J.) Ch. R. 157; *Smith v. Adams*, 6 Paige, (N. Y.) Ch. R. 435.

⁴ *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. R. 706; *Lane v. Newdigate*, 10 Ves. R. 194; *Chalk v. Wyatt*, 3 Meriv. R. 688; *Martin v. Stiles*, Mosel. R. 145.

In *Robinson v. Lord Byron*,¹ where an injunction was prayed for against using the water of a stream in any other manner than it had been used before ; and it appeared that the defendant sometimes withheld the water, and at others discharged it in such quantities as to create a danger of sweeping away the plaintiff's mills ; the injunction was granted as prayed, until an action then pending for the injury complained of was decided ; and the right being found for the plaintiff, the injunction was made perpetual. After a long enjoyment of a watercourse through the land of another, a grant will be presumed, unless disproved by the other side, and the plaintiff be quieted in his enjoyment by injunction.² A plaintiff who has been in possession for a long time of a watercourse, was quieted by an injunction against the interruption of the defendant who had diverted it, although the plaintiff had not established his right at law ; and the Court said that such bills were usual.³

§ 446. The same doctrine we find applied to disturbances to, and by means of, watercourses in this country.⁴ We find it laid down, that where the owners of hydraulic works on both banks of a watercourse, being each entitled to an equal share of the water, if the owner of mills on either side attempts to deprive

¹ *Robinson v. Lord Byron*, 1 Bro. C. C. 588.

² *Finch v. Resbridger*, 2 Vern. R. 390.

³ *Bush v. Western*, Prec. Ch. 530.

⁴ Story lays down the doctrine as follows : " Cases of a nature calling for the like remedial interposition of Courts of Equity, are the obstruction of watercourses, the diversion of streams from mills, the back flowage on mills, and the pulling down the banks of rivers, and thereby exposing adjacent lands to inundation, or adjacent mills to destruction." 2 Story, Eq. Jurisp. § 927 ; *Binney's Case*, 2 Bland, (Md.) Ch. R. 99.

the other of the use of his share of the water, of which he has been in the quiet enjoyment, and thus destroy his mills, a preliminary injunction will be granted, on the ground that the injury may be irreparable. In this case, Chancellor Walworth said,—
“There is no doubt of the jurisdiction of the Court in this case, as the new dam would in a great measure destroy the complainant’s valuable mills, which have been in operation for many years. The regulation of the use of water upon the different sides of the stream for hydraulic purposes, is so essential to the manufacturing interests of our community, and in fact to every branch of domestic industry, that it would be deplorable if any of these important establishments could be destroyed by any individual, or combination of persons, and the owners left to seek an uncertain remedy by an action for damages in a Court of Law.¹ In an appeal of a case respecting the use of water, from the Court of Chancery in New York to the Court of Errors, the decree of the Chancellor refusing to dissolve an injunction was affirmed. It was not denied, in this case, that the effect of the dam in question, when completed, would be to divert a large proportion of the water from the mills of the respondents; nor was it denied that it was the intention of the appellants, if not restrained, to complete the dam; and it was therefore held a proper case for a preliminary injunction, as the injury might be irreparable.²

§ 447. Again, where the complainants were the several owners of different mills on the same water-

¹ *Arthur v. Case*, 1 Paige, (N. Y.) Ch. R. 447.

² *Caise v. Haight*, 8 Wend. (N. Y.) R. 632.

course, which mills depended upon a particular use of the water of a pond at the head of the watercourse for the running thereof, and, as such mill-owners had been in the interrupted use of the water in a particular manner for more than twenty years ; it was held, that a Court of Equity had jurisdiction to establish their right to such use of the waters of the pond, and to restrain the defendant from disturbing them in the enjoyment thereof.¹

§ 448. Where a mill stream broke the bank, wearing the defendant's ground, and the stream was escaping into a new channel, and irreparable mischief was to be apprehended, the Court made an additional order before appearance, to restrain the defendant from preventing the plaintiff from repairing the bank for the purpose of bringing back the water into its proper channel ; and also to restrain the defendant from preventing the plaintiff from entering on that part of the lands in possession of the defendant, which formed part of the bank of the stream, to repair the breach ; and also to restrain the defendant from cutting, digging, or making any channel for the water of said stream, on the lands in his possession, whereby the watercourse might be diverted from the plaintiff's mill, unless cause was shown within six days.²

§ 449. We have seen that an action on the case may be maintained for the diversion of a watercourse, or for making backwater, even although no actual damage is thereby occasioned, on the ground of the injury done to the *right* of the riparian proprietors

¹ Belknap v. Trimble, 3 Paige, (N. Y.) Ch. R. 577.

² M'Swiney v. Haynes, 1 Irish Eq. R. 322.

affected, and the acquisition of an adverse right by the uninterrupted enjoyment of the diversion, &c., for twenty years.¹ On the same ground a bill in equity may be maintained in such cases for an injunction, though there are some few cases, in which it seems to have been considered, that, as against a riparian owner seeking to erect an improvement on his own land, the complainant is bound to show that his superior rights will be not *probably*, but *really* and *sensibly* affected.² The weight of authority is, however, decidedly different. In a bill in equity for an injunction by the plaintiff to prevent the defendant from diverting a watercourse from the plaintiff's mill, and for further relief, the general doctrine in respect to equitable jurisdiction in such cases, is thus stated by Mr. J. STORY:—"If no action were maintainable at law, without proof of actual damage, that would furnish no ground, why a Court of Equity should not interfere, and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a Court of Equity is, that the right can only be permanently preserved or perpetuated by the powers of a Court of Equity. And one of the most ordinary processes, to accomplish this end, is by a writ of injunction, the nature and efficacy of which, for such purpose, I need not state, as the elementary treatises fully expound them. If, then, the diversion of the water complained of in the present case is a violation of the right of the plaintiffs, and may permanently injure that right, and become, by lapse of time, the

¹ See Ante, § 133 - 136.

² *Shreve v. Voorhees*, 2 Green, (N. J.) Ch. R. 25; *Quackenbush v. Van Riper*, Ibid. 350.

foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a Court of Equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then *a fortiori*, a Court of Equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs. A Court of Equity will not indeed entertain a bill for an injunction, in case of a mere trespass fully remediable at law. But, if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill.”¹

§ 450. In *Gardner v. Newburgh*,² the bill in substance stated, that the plaintiff was owner of a farm, through which a stream of water had, from time immemorial, run; that it supplied water to his brick-yard, distillery, and churning-mill, and to a mill-seat where he was about erecting a mill for grinding plaster of paris; that the trustees of the village of Newburgh (the defendants) obtained an act of the legislature to enable them to supply the inhabitants of the village with water; that the trustees threatened to divert the stream from the plaintiff’s farm; and the plaintiff, therefore, prayed an injunction to prevent the defendants from diverting the water. The injunction was

¹ *Webb v. Portland Manuf. Co.* 3 Sumn. (Cir. Co.) R. 189; and see likewise *Tyler v. Wilkinson*, 4 Mason, (Cir. Co.) R. 397; *Mayor, &c. v. Commissioners of Spring Garden*, 7 Barr, (Penn.) R. 348; *Hulme v. Shreve*, 3 Green, (N. J.) Ch. R. 116; *Shields v. Arndt*, Ibid. 234; *Hart v. Mayor of Albany*, 3 Paige, (N. Y.) Ch. R. 213; *West v. Walker*, 2 Green, (N. J.) Ch. R. 279.

² *Gardner v. Newburgh*, 2 Johns. (N. Y.) Ch. R. 162.

granted; Chancellor KENT observing, "In the application of the general doctrines of the Court to this case, it appears to me to be proper and necessary that the preventive remedy be applied. There is no need, from what at present appears, of sending the plaintiff at law to have his title first established. His right to the use of the stream is one which has been immemorially enjoyed, and of which he is now in the actual possession. The trustees set up no other right to the stream, than what is derived from the authority of the statute; and if they are suffered to proceed and divert the stream, or the most essential part of it, the plaintiff would receive immediate and great injury, by the suspension of all those works upon his land which are set in operation by the water. In addition to this, he will lose the comfort and use of the stream for farming and domestic purposes; and besides, it must be painful to any one to be deprived, at once, of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling."

§ 451. If a person, being the sole owner of one mill and *tenant in common* of another mill, uses in his several mill more water than appertains to it, to the injury of the mill owned in common, his co-tenant may maintain a bill in equity against him.¹ Notwithstanding A and B may be tenants in common of a lower mill, and the water privilege connected with it; yet if the acts of B complained of, tend to a destruction of the joint property, A is entitled to equitable interposition and relief.²

§ 452. Unless, however, the plaintiff's title appears

¹ *May v. Parker*, 12 Pick. (Mass.) R. 34; and see *Ante*, § 401.

² *Kennedy v. Scovil*, 12 Conn. R. 317.

on the face of the bill to be fully established, the defendant may demur to the bill for want of equity. Thus, in the case of *Weller v. Smeaton*,¹ the bill stated the plaintiff to be the lessee of an ancient mill, and that the defendant had erected flood-gates, and other works on the river, which obstructed the plaintiff's mill, and prayed they might be removed; the Court allowed a demurrer for want of equity, it appearing that the works had been erected for upward of three years, and no steps had been taken to establish the plaintiff's right at law. In all cases, in fact, in which doubt exists as to the legal right, a Court of Equity will compel the parties to go to trial at law, without delay, either dissolving the injunction or maintaining it until such trial has taken place, as the justice of the case, and the interests to be affected by the determination, appear to require.²

§ 453. An injunction was refused in the following case in the Circuit Court of the United States, in New Jersey: The defendants having had the adverse possession, for twenty years, of certain water which had previously flowed into the plaintiff's mill-pond, which they had used, during that period, by means of an aqueduct for supplying water to a certain town, suffered it to go into disuse, in consequence of a decay of the logs of the aqueduct, for three years; during which time the water again flowed into the plaintiff's

¹ *Weller v. Smeaton*, 1 Cox, Ch. R. 102.

² See *Wistanley v. Lee*, 2 Swanst. Ch. R. 337; *Whitechurch v. Hide*, 3 Atk. Ch. R. 391; *Van Bergen v. Van Bergen*, 3 Johns. (N. Y.) Ch. R. 282; *Reid v. Gifford*, 6 Johns. (N. Y.) Ch. R. 19; 1 Hopk. (N. Y.) Ch. R. 416; *Coalter v. Hunter*, 4 Rand, (Va.) R. 58; *Binney's Case*, 2 Bland, (Md.) Ch. R. 99; *Gates v. Blencoe*, 1 Dana, (Ken.) R. 15; *Eden on Injunct.* 272, (Am. Edit. 1839.)

pond. The defendants commenced the reconstruction of the aqueduct, and thereupon the plaintiff applied for an injunction; and the same was refused, on the ground that twenty years' possession vested a complete title to the water in the defendants; which title was not impaired by the three years' reflow of the water into the plaintiff's pond. Acquiescence, the Court held, by the plaintiff, or by those under whom he claimed, for a shorter period than twenty years, would be sufficient to induce a refusal of the injunction. The Court also doubted, whether the case was the case of irreparable mischief, in which the extraordinary power prayed for would be exercised.¹

§ 454. It has been held, by the Court of Appeals of Virginia, that when a corporation claims a right, under the authority of the State, to abate a mill-dam, as a nuisance, because it obstructs the navigation of a stream; and such abatement would produce great loss to the mill-owner, and great inconvenience to the public; a Court of Equity has jurisdiction to prevent such abatement, and to preserve to the mill-owner his establishment, until the question whether the mill-owner has or has not a right to keep up his dam, be decided. The inadequacy of the damages, which any jury could give to the mill-owner for the removal of his dam, it was also held, was a good ground for the interposition of equity.²

¹ *Haight v. Proprietors of Morris Aqueduct*, 4 Wash. C. C. R. 601.

² *Crenshaw v. Slate River Company*, 6 Rand, (Va.) R. 245. For the principles on which a Court of Equity proceeds in interposing by injunction, between public companies in cases of apprehended nuisance, see *Ripon v. Herbert*, 8 Eng. Con. Ch. R. 331; *Blakemore v. Glamorganshire Canal Navigation*, 1 Mylne & Keen, Ch. R. 15; *Boston Water Power Co. v. Boston and Worcester Railroad Co.*, 16 Pick. (Mass.) R. 412.

§ 455. It is no objection to the granting of an injunction, that the plaintiff has commenced an action at law;¹ and in one instance where this was the case, it was offered to discontinue the action if necessary, but Lord ELDON held it immaterial.²

§ 456. If a Court has not a general jurisdiction in equity, it is necessary for the plaintiff to make it appear affirmatively on the face of the bill, that his case is within the jurisdiction of the Court; and the question, whether it is so or not, is properly raised by a general demurrer.³

¹ Eden on Injunct. 276.

² Attorney-Gen. v. Nichol, 3 Meriv. Ch. R. 687.

³ May v. Parker, 12 Pick. (Mass.) R. 34.

CHAPTER XI.

OF THE RIGHT OF EMINENT DOMAIN AS APPLIED TO PRIVATE
PROPERTY IN WATERCOURSES.

1. The Universality and Limit of the Right of Eminent Domain.
2. As a part of English Law.
3. As a part of the Constitutional Law of the United States.
4. Of the "Public Use."
5. Of the Nature and Kind of Compensation.
6. Of the Provision for Indemnity.

1. *Universality and Limit of the Right of Eminent Domain.*

§ 457. AMONG the variety of legal titles which, in this country, have often been involved in controversies respecting the rights of riparian proprietors on inland streams and rivers, is the important one entitled "*eminent domain*," or the right which the government retains over the estates of individuals to appropriate them to *public use*. It is obvious, that the government of no State can administer its public affairs in the most beneficial manner to the community at large, if it cannot, on particular emergencies and for public utility, exercise at least a qualified power of disposing of, or of impairing in value, the property of an individual citizen. To this power, according to Vattel, "men have impliedly yielded, though it has not been expressly reserved."¹ But it is a rule founded in equity, and is laid down by jurists as an acknowledged principle of universal law, that a *provision for compen-*

¹ Vattel, ch. 20, s. 34.

sation is a necessary attendant on the due exercise of the power of the law-giver to deprive an individual of his property without his consent.¹ The law is universally recognized as laid down by Bynkershoek, that "this *eminent domain* may be lawfully exercised whenever public necessity or *public utility* requires it," and that "the sovereign power may take from proprietors those things without which highroads cannot be made;" and that "this right may be imparted to others occasionally, as to the chief magistrates of towns, cities," &c. But then he annexes the qualification, that "if houses and lands be taken from individuals, *adequate compensation* should be made."²

2. *As a Part of English Law.*

§ 458. In England, notwithstanding the transcendent power of its Parliament, the law on this subject has been administered on the above just and equitable principles. In the familiar instance of an Act of Parliament, for promoting some specific object or undertaking of a public nature, as a turnpike, navigation, canal, or railway, the legislature scruple to interfere with private property and compel the owner of land to alienate it, without providing a reasonable price and compensation for so doing. "If a new road," says BLACKSTONE, "were to be made through the grounds of a private person, it might perhaps be extensively

¹ 2 Kent. Comm. 839.

² Bynkershoek, lib. 2, ch. 15. See also Grotius, *De Jure*, &c., b. 2, ch. 19, s. 7; Puff. b. 8, ch. 5, s. 3, 7. That the power of government to take private property may be imparted to individuals and corporations, see *Beekman v. Schenectady and Saratoga Railroad Co.*, 3 Paige, (N. Y.) Ch. R. 45; *Pittsburgh v. Scott*, 1 Barr, (Penn.) R. 309.

beneficial to the public ; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community ; for it would be dangerous to allow any private man, or even public tribunal, to be the judge of this common good, and to decide whether it be expedient, or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and in similar cases, the *legislature alone* can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner ; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is considered as an individual, treating with an individual for exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price ; and even this is an extension of power which the legislature indulges with caution." ¹

§ 459. It is now considered in England, that the true principle applicable to all such cases, is, that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a *public object* of adequate importance, and that the interference is one of an extraordinary character.² The

¹ 1 Bla. Com. 139.

² See per Lord Eldon, 1 Mylne & Keen, Ch. R. 162 ; Webb v. Manchester and Leeds Railway Co., 4 Mylne & Cr. Ch. R. 116, in which the principles on which equity will exercise its jurisdiction over companies

English Courts will not, therefore, so construe an act of Parliament as to deprive persons of their estates, and transfer them to other parties without compensation, in the absence of any manifest or obvious reasons of policy for so doing, unless they are so fettered by the express words of the statute as to be unable to extricate themselves;¹ for they will not suppose the legislature had such an intention.² As it was observed in a recent case, where large powers are intrusted to a company to carry their works through a great extent of country, without the consent of the owners and occupiers of the land through which they are to pass, it is reasonable and just, that any injury to property which can be shown to arise from the prosecution of those works should be fairly compensated to the party sustaining it.³ The extraordinary powers with which railways and other similar companies in England are invested by Parliament, are given to them "in consideration of a benefit, which, notwithstanding all other sacrifices, is, on the whole, hoped to be obtained by the public;" and that since the public interest is to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by such acts necessarily occasion, they must always be carefully looked to, and must not be

invested with compulsory powers are considered. See also *Simpson v. Lord Howden*, 1 Keen. Ch. R. 598; *Lister v. Lobley*, 7 Adol. & Ell. R. 124.

¹ See Broom, Legal Max. 4.

² *Stracey v. Nelson*, 12 M. & Welsb. R. 540; *Hutchinson v. Manchester and Rossendale Railway Co.*, 14 M. & Welsb. R. 694.

³ *Regina v. East Counties Railway Co.*, 2 Q. B., cited in Broom, Legal Max. 4; *Blakemore v. Glamorganshire Canal Co.*, 1 Mylne & Kean, Ch. R. 162.

extended farther than the legislature has provided, or than is necessarily and properly required for the purposes which it has sanctioned.¹

§ 460. By the English act of Parliament 8 and 9 Vict. c. 20, an act for consolidating in one act, certain provisions usually inserted in acts authorizing the making of *railways*, it is enacted (sect. 16) that any incorporated railway company may alter the course of any watercourses, not navigable, in order the more conveniently to carry the same over or under or by the side of the railway. But in the exercise of the powers by that act granted, the act provides, that the company shall do as little damage as can be, and shall make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers.² Moreover, if railway companies, in England, in carrying on their works, do more damage than the necessity of the case requires, the Court of Chancery will restrain them by injunction.³

3. *As a Part of the Constitutional Law of the United States.*

§ 461. In England, where the power of Parliament is said to be omnipotent, (meaning so far as the exercise of mere human power is concerned,) there may be no remedy for an abuse of the power of taking private property, where it is by the concurrent act of the

¹ Per Lord Langdale, in *Coleman v. East Counties Railway Co.*, 16 Law Journ. (Chan.) 78.

² Shelford on Railways, 322, 342.

³ *Manser v. Northern and Eastern Counties Railway Co.*, 2 Railw. Ca. 391; *Agar v. Regent's Canal Co.*, Coop. C. C. 77.

three estates of the realm; but in a State governed by a *written constitution*, like the North American States, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it to another, where there is no foundation for a pretence that the public is to be benefited thereby, such an abuse of the right of *eminent domain* is an infringement of the letter as well as of the spirit of the Constitution; and, therefore, not within the general powers delegated by the people to the legislature.¹ By the fifth article of the Constitution of the United States (and a similar article may be found in the Constitutions and Bills of Rights of nearly, if in not of all of the several States) — “Private property shall not be taken for public use without just compensation.” But even if there exists no such clause in a State Constitution, whenever the power in question is exercised by the legislature, natural justice speaks so forcibly on this subject, that just compensation will be made.²

§ 462. By the third section of the Act of the State of New York, entitled an “Act respecting navigable communications between the great western and northern lakes and the Atlantic ocean,” the canal commissioners are only authorized to appropriate the streams of water necessary for the prosecution of the work

¹ *Varick v. Smith*, 5 Paige, (N. Y.) Ch. R. 137.

² *Bristol v. New Chester*, 3 N. Hamp. R. 535; *Embury v. Connor*, 2 Sand. (N. Y.) Sup. Ct. R. 98; *Young v. Harrison*, 6 Georgia R. 131. The State of New York possesses the power to appropriate to public use the lands of the Indians, within their territory, upon making compensation therefor; notwithstanding the grant of the right of preëmption in such lands to Massachusetts. *Wadsworth v. Buffalo Hydraulic Association*, 15 Barb. (N. Y.) Sup. Co. R. 88.

intended by the Act, by making a just and equitable assessment of the loss or damage, if any, over and above the benefit to the respective riparian owners resulting from the making and constructing of the work. In the Supreme Court of Errors of New York, the views expressed by Chancellor WALWORTH and Senator ALLEN, were, that the State had not the right, without making compensation, to destroy the property of riparian proprietors upon rivers above tide-water, in making waters navigable that are not so by nature; or in appropriating the water of such rivers to the public use by artificial erections.¹ By the spirit and meaning of both the constitution and the canal laws of that State, if any individual is *consequently* injured by the erection of a dam under the authority of the legislature, with a view to afford water to a canal, he is entitled to compensation for the injury sustained, equally as though his property had been *taken* for public use.²

§ 463. In Virginia, mills are considered as of great public convenience, and they are regulated by acts of the legislature; and, among other things, a jury is to inquire whether *ordinary navigation* will be obstructed, and if they report that it will not, then leave is granted to erect a mill, without any condition as to navigation. The grant, under such a precautionary proceeding, is a perfect one, and vests in the grantee all the *public right* to the stream, or rather, so much thereof as is necessary to the full enjoyment of the

¹ Canal Commissioners v. The People, 5 Wend. (N. Y.) R. 423; and see People v. Platt, 17 Johns. (N. Y.) R. 195. And see Hudson and Del. Canal Co., v. New York and Erie Rail Road Co., 9 Paige, 323.

² People v. Canal Appraisers, 13 Wend. (N. Y.) R. 355.

mill. Therefore, it has been held, that a subsequent act of the legislature, which imposes upon such a grantee, who has established a mill and erected a dam, the burden of erecting locks through his dam, of keeping the locks in repair, and of giving his attention to the admission of passage-boats, and which vests, on his failure, in a company the power to abate the dam as a nuisance, — without a full indemnification and equivalent for the injury thus done to his vested rights, — is unconstitutional and void.¹

§ 464. A company under a charter to make a lock navigation in a public stream, has not the same privilege as a riparian owner, but must pay for all damage done to the property of others, when required to do so by the terms of its charter; and injuries resulting from swelling of the river, *during floods*, (for which a riparian proprietor is not liable,) ² which is increased by the erection of their dams, are within the law giving compensation for all injuries occasioned by overflowing lands lying on the stream or its tributaries, or impairing the usefulness of any mill-dam situated thereon.³

§ 465. In an action on the case for the diversion of water from the river Farmington, in Connecticut, to the injury of the plaintiff; it appeared, that the water of that river was obstructed in its passage to the plaintiff's factory, and diverted therefrom so as to produce a substantial injury to him, by the works of the New Haven and Northampton Company, of which no survey or appraisal under the charter had been had,

¹ Crenshaw v. Slate River Co., 6 Rand. (Va.) R. 245.

² Ante, § 348, 349.

³ Monongahela Co. v. Coon, 6 Barr, (Penn.) R. 379.

and for which no damages had been assessed and no compensation made. It was held, that the plaintiff was entitled to redress in an action on the case, although the dams producing such injury were erected with the approbation of the commissioners, before the plaintiff had any interest in the property to which the injury was done, and had not since been raised.¹

§ 465 *a*. It is not necessary that land should be absolutely *taken*, but any serious interruption to its common and necessary use, is equivalent to the *taking* of it; so that, if a corporation is created by the legislature, for the purpose of constructing and maintaining a canal, if no compensation is made or provided for a discharge of the water from the canal, upon the lands of others, they are entitled in an action on the case to recover damages for an injury sustained by such discharge.²

4. *Of the "Public Use."*

§ 466. As a general rule, it must undoubtedly rest in the discretion and wisdom of the legislature to determine when public uses require the assumption and appropriation of private property; although the question is one not without embarrassment, as the line of demarcation between a use that is public, and one that is strictly private, is not to be drawn without much consideration.³ It has been said by a learned

¹ *Denslow v. New Haven and Northampton Co.* 16 Conn. R. 98.

² *Hooker v. New Haven and Northampton Co.*, 14 Conn. R. 146; and see also *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) R. 344, 348.

³ 2 Kent. Comm. 339; Smith, Comm. on Stat. and Const. Law, § 325; *Pittsburgh v. Scott*, 1 Barr, (Penn.) R. 309; *Beekman v. Schenectady and Saratoga Rail Road Co.*, 3 Paige, (N. Y.) Ch. R. 45. "The two branches of the legislature, subject only to the qualified veto of the execu-

Judge, that "it is difficult, perhaps impossible, to lay down any general rule, that would precisely define the power of the government, in the exercise of the acknowledged right of eminent domain; it must be large and liberal, so as to meet the public exigencies, and it must be so limited and restrained, as to secure effectually the rights of the citizen; and it must depend, in some instances, upon the nature of the exigencies as they arise, and the circumstances of particular cases."¹ One thing is incontrovertible, and that is, that the necessities of the public for the use to which the property is to be appropriated must exist as *the basis* upon which the right is founded.² Where private property, therefore, is wanted merely for *ornamental* purposes, this right cannot be exercised, as the purpose must be *useful*.³

tive, are the sole judges, as to the expediency of making police regulations interfering with the natural rights of our citizens, which regulations are not prohibited by the Constitution; and also as to the expediency of exercising the right of *eminent domain* for the purpose of making public improvements either for the benefit of the inhabitants of the State generally, or of any particular section thereof." Per Chancellor Walworth, in *Varick v. Smith*, 5 Paige, (N. Y.) Ch. R. 137. And see *L. C. and C. Rail Road Co. v. Chappell*, 1 Rice (S. C.) R. 383; *Harris v. Thompson*, 9 Barb. (N. Y.) Sup. Co. R. 350; *Hooker v. New Haven, &c., Co.*, 14 Conn. R. 146; *Binney's Case*, 2 Bland, (Md.) Ch. R. 99.

¹ Per Shaw, C. J., in *Boston Water Power Co. v. Boston and Worcester Rail Road Co.*, 23 Pick. (Mass.) R. 360.

² *Smith*, Comm. on Stat. and Const. Law, § 325; *Wilkinson v. Leland*, 2 Peters, (U. S.) R. 653; *Albany Street (Case of)*, 11 Wend. (N. Y.) R. 149; *Rice v. Parkman*, 16 Mass. R. 330; *Varick v. Smith*, 5 Paige, (N. Y.) Ch. R. 159; *Norman v. Heist*, 5 Watts & S. (Penn.) R. 171; *Hardin v. Goodlet*, 3 Yerg. (Tenn.) R. 41; *Dunn v. City Council*, Harp. (S. C.) R. 189; *Lindsay v. Charleston Commissioners*, 2 Bay, (S. C.) R. 54; *Cottrill v. Myrick*, 3 Fairf. (Me.) R. 222; *Dyer v. Tuscaloosa Bridge Co.*, 2 Port., (Ala.) R. 296.

³ See *Boston and Roxbury Mill Corp. v. Newman*, 12 Pick. (Mass.) R. 476.

§ 467. Although it rests with the wisdom of the legislature to determine what is a "public use," and also the necessity for taking the property of an individual for that purpose; yet the right of eminent domain does not authorize the government, even for a full compensation, *to take the property of one citizen and transfer it to another*, when the public is not interested in the transfer.¹ The possession and exertion of such a power would be incompatible with the nature and very object of all government; for, it being admitted, that a chief end for which government is instituted, is, that every man may enjoy his own; it follows, necessarily, that the rightful exercise of a power by the government of taking arbitrarily from any man what is his own, for the purpose of giving it to another, would subvert the very foundation principle upon which the government was organized, and resolve the political community into its original chaotic elements.² In the matter of Albany Street, Chief Justice SAVAGE, (in commenting on the section of the law under which the Corporation of the City of New York had proceeded in widening a street,) says, that, "the constitution, by authorizing appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the private use of another." It is in violation, he says, of natural right; and if it is not in violation of the *letter* of the constitution, it is of its

¹ *Pittsburgh v. Scott*, 1 Barr, (Penn.) R. 139; *Beekman v. Schenectady and Saratoga Railroad Co.*, 8 Paige, (N. Y.) Ch. R. 45; *Varick v. Smith*, 5 Paige, (N. Y.) Ch. R. 159; *Taylor v. Porter*, 4 Hill, (N. Y.) R. 140.

² *Bloodgood v. Mohawk & Hudson Railroad Co.* 18 Wend. (N. Y.) R. 56.

spirit.¹ In *Bloodgood v. Railroad Company*, Mr. Senator TRACY says, "these words of the constitution should be construed as equivalent to a constitutional declaration, that private property, without the consent of the owner, shall be taken *only* for the public use, and then only upon a just compensation."² Chancellor BLAND, of Maryland, in giving his opinion in an important case, says,—"The government of this Republic, by virtue of that *eminent domain*, which, for public purposes is intrusted to all governments, may take the property of any individual and cause it to be applied to the use of the public, on making him a reasonable compensation. But," says he, "it cannot arbitrarily take property from one citizen and bestow it on another; because such an act, although not specially prohibited by the Constitution, would be contrary to the fundamental principles of the government itself."³ As has been declared by a learned Judge in Virginia, "Liberty itself consists essentially, as well in the security of private property, as of the persons of individuals; and this security of private property is one of the primary objects of civil government, which our ancestors, in framing our Constitution, intended to secure to themselves and their posterity, effectually, and forever."⁴

§ 468. There are no instances in which private

¹ Albany Street (in the Matter of), 11 Wend. (N. Y.) R. 149.

² *Bloodgood v. Railroad Co.*, 18 Wend. (N. Y.) R. 59; see *Embury v. Connor*, 2 Sand. (N. Y.) Sup. Co. R. 98.

³ *Hepburn's Case*, 3 Bland, (Md.) Ch. R. 98. And the Chancellor refers to *Campbell's Case*, 2 Bland, (Md.) Ch. R. 230; and *Partridge v. Dorsey*, 3 H. & Johns. (Md.) R. 302.

⁴ Per Mr. J. Green, in *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) R. 245.

property of any denomination can be taken by State authority for the mere purpose of raising a revenue (unless in the regular mode of taxation); and an assumption of power to that extent would be entirely destructive of individual right, and annihilate, at the pleasure of the State, all distinctions between *meum* and *tuum*. Therefore, canal commissioners, who are authorized by the legislature to take water enough from a *watercourse* for canal navigation, have no authority, for the purpose of creating hydraulic power, to sell or lease the surplus water for the benefit of the public revenue. Although, in conducting the water to the canal through a feeder, the State agents must necessarily exercise a discretionary power, yet the water can only be taken by them for canal purposes; and if taken and rented to an individual, no title would pass against the riparian owners entitled to it by law.¹

§ 469. Lots bounding upon a river, and immediately below a State dam erected for the use of a canal, were sold by the New York commissioners of the land office as water lots bounding upon the river; and it was held, that the purchaser of such water lots was entitled to the water privileges connected with such lots at the time of the sale, by *the natural flow of the surplus water* over the State dam, so far as could be used without interfering with the right of navigation; and that the State officers could not afterwards lease such surplus waters, and authorize the lessee to prevent them from flowing over the dam, to the injury of the water privileges connected with the water lots thus sold. The

¹ *Buckingham v. Smith*, 10 Ohio R. 288.

language of the Court, in the appeal of this case, was,—“The government has the power, under the Constitution, to appropriate the private property of its citizens, just so far, and no farther, than is necessary for the purpose and object of the appropriation; and that may be an absolute and exclusive right to land or water, or it may be a partial or common or usufructuary right, according to the nature of the property or the circumstances of the case. But when such purpose is accomplished, the right of the State is exhausted, and the whole of the residue of the property, whatever it may be, belongs to the citizen.”¹

§ 470. So, canal commissioners are not authorized to dispose of the water power of a stream to persons who have been injured by the canal, to pay them for their damages;² and where the mill of a person is likely to be injured by a dam erected above it to supply a canal feeder, the canal commissioners have no power to dig a race across another person's land, without consent, to conduct the water from the feeder to the mill-owner, and so compensate him for his loss; and if a threat is made to dig such a race, an injunction will lie.³

§ 471. Although, in Ohio, the law authorizes canal commissioners to dispose of the water for hydraulic purposes, with a view to raise a revenue to aid in defraying the expense of the canal, still this relates only to the water which is necessary for the naviga-

¹ *Varick v. Smith*, 5 Paige, (N. Y.) Ch. R. 137, and on appeal, 9 Paige, (N. Y.) Ch. R. 547. And see *Harris v. Thompson*, 9 Barb. (N. Y.) Sup. Co. R. 350.

² *M'Arthur v. Kelley*, 5 Ohio R. 84.

³ *Ibid.*

tion of the canal, and which can be used for no other purposes, without interfering with that navigation. It does not authorize them to receive a surplus quantity of water into the canal, that they may dispose of it; for the reason that private property can only be taken by the legislature or its agents when necessary for the public welfare, and that, in such case, compensation must be made.¹

§ 471 *a*. But a party may renounce a constitutional provision made for his benefit, and a law, therefore, which provides for the transfer of property from one individual to another with the consent of the owner, is not unconstitutional. And where such a law does not require the consent to be in writing, it may be manifested by parol acts and declarations, so as to effect a transfer of the title, notwithstanding the statute of frauds.²

5. *Of the Nature and Kind of Compensation.*

§ 472. The constitutional obligation on the part of the government to make compensation when taking private property for the benefit of the public, is as it were, a *debt*, and as such should be paid in *money*; and the inhibition imposed upon State governments, by the Constitution of the United States, that they shall not make any thing but gold and silver a lawful tender for a debt, should be extended to the case of *such* a debt.³ A certain learned Judge, entitled to

¹ *Cooper v. Williams*, 5 Ohio R. 244.

² *Embury v. Connor*, 3 Comst. (N. Y.) R. 511, and see *ante* Chap. VIII.

³ Smith on Stat. and Const. Law, p. 471; *Seymour v. Carter*, 2 Met. (Mass.) R. 520.

high respect, it is true, has expressed an opposite opinion, and considers, that although there is a primary convenience in money, as a medium of commercial exchange, yet it rests with the legislature to determine the *kind* of compensation to be made.¹ This opinion was expressed in commenting upon the case of *Van Horne's Lessee v. Dorrance*,² in which case it was held, that no just compensation could be made except in money, that being the *common standard*, by comparison with which the value of any thing may be ascertained. It was not only a sign which represented the respective value of commodities; but a universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. Land or any thing else may be a compensation, yet it must be at the election of the party.

§ 473. It has been said of the above decision, that its accuracy had been questioned, and that, if it be a correct exposition of the Constitution, the legislature had violated the provision in question in more instances than one.³ This remark was made upon the assumption (of which there are other instances) that an estimate made of the benefits to accrue to the owner of property taken for public use, and that a direction that the amount of such estimated benefit shall be deducted from the value of the property taken, were in conflict with the decision in *Van Horne's Les-*

¹ Mr. J. Rogers, in *McMaster v. Commonwealth*, 3 Watts, (Penn.) R. 296.

² *Van Horne's Lessee v. Dorrance*, 2 Dallas, R. 313.

³ Mr. J. Huston, in *Satterlee v. Mathewson*, 16 S. & Rawle, (Penn.) R. 179.

see *v. Dorrance*. But if the subject is attentively considered, there does not appear this conflict. The damage to the party whose property is condemned to public use, is the value of the property, less the actual amount of benefit accruing to the residue of the property of the same individual, by reason of the use made of that taken.¹ To that extent, it is a *just compensation*. That a just and full *compensation* must be made in *money* is certain; but if in appropriating property of the value of *four thousand* dollars, when, by the same appropriation, the value of what remains is increased *two thousand* dollars, and the value of the property taken is the rule of damages, the owner actually takes *two thousand* without the least consideration, and receives more than the Constitution enjoins to be paid, because it is *more* than a compensation.²

§ 474. Acts of legislation like those just considered, have in this country long been acquiesced in, and have received, moreover, judicial sanction. In many of our turnpike and canal acts, there is a direction to consider the advantages accruing from the road or the canal, as well as the injury done to the owner of the land taken; and such a provision received judicial sanction in the

¹ Smith on Stat. and Const. Law, p. 470.

² Opinion of Wood, C. J., *Symonds v. City of Cincinnati*, 14 Ohio R. 174. In some instances, such acts direct an assessment of benefit to lots owned by persons whose land is not taken for public use, for the advantage of those who may be injured by the improvement; and such acts have also received judicial sanction. *McMaster v. Commonwealth*, 3 Watts, (Penn.) R. 296. But see *People v. Mayor, &c. of Brooklyn*, 6 Barb. (N. Y.) Sup. Co. R. 209, and 4 Comst. 419, S. C. That the intrinsic value of the land is not the true rule of damages, and that in assessing the compensation, the advantage or injury resulting to the owner of lands, from the construction of a railroad (*e. g.*), may be considered. *Whiteman's Ex'x v. Railroad Co.*, 2 Harr. (Del.) R. 514.

intervention of a jury, or other mode equally equitable. The two first-mentioned modes approximate to an ordinary bargain, and the will of the parties whose interests are affected, or that their agents, is exercised. The last-mentioned mode — the intervention of a jury, &c., — is resorted to when it is supposed the parties will be unable to agree; and here is the important constitutional guard, and the proper restraint, upon the exercise of legislative authority on such occasions.¹ In one of the cases just cited,² it was held, that an act of the State of Pennsylvania, by which a “board of property” were to decide upon the value of the land to be taken, without the participation of the party, or the interposition of a jury, was unconstitutional and void. But the damages in such cases may be assessed in any equitable and fair mode to be provided by law, without the intervention of a jury, inasmuch as trial by jury is only required on issues of fact, in civil and criminal cases, in Courts of Justice.³

§ 476. The constitutionality of the legislative power of taking private property depends upon the provision for a just indemnity; so that a statute incorporating a company to take private property without the consent of the owner, to promote any work for the public benefit, and making *no* provision for his indemnity, is

¹ *Van Horne's Lessee v. Dorrance*, 2 Dallas, R. 313; *Armstrong v. Jackson*, 1 Black. (Ind.) R. 374; *Tolly v. Railroad Co.* 9 Barb. (N. Y.) Sup. Co. R. 449.

² *Van Horne's Lessee, &c. ub. sup.*

³ 3 Kent, Comm. (6th edit.) 339, note b; *Beekman v. Schenectady and Saratoga Railroad Co.*, 3 Paige, (N. Y.) Ch. R. 45; *Bonaparte v. Camden and Amboy Railroad Co.*, 1 Bald. (Cir. Co.) R. 205; *Railroad Co. v. Davis*, 2 Dev. & Batt. (N. C.) R. 464; *Willyard v. Hamilton*, 7 Ohio, R. 115; *Louisv. C. and C. Railroad Co. v. Chappell*, 1 Rice, (S. C.) R. 383.

unconstitutional and void.¹ Thus the erection of a dam across a navigable water by an individual, under the authority of a statute of New Jersey, providing no remedy to the owner of a meadow overflowed by means of the dam, was held to be an injury for which the owner had his action for damages.² And so, if the legislature should authorize a public improvement by means of a *canal*, and the execution of the work would require or produce the destruction of, or diminution of, the value of private property, without affording at the same time means of relief and indemnification, the owner of the property destroyed or injured may have his action at Common Law, against those who caused the damage.³ An act authorizing one to build a dam on his own land upon a river which is a highway, merely protects him from an indictment for a nuisance; and if, in doing this, he overflows his neighbor's land, he is liable to an action therefor.⁴ So strictly is the rule adhered to, that if an attempt is made under a statute to take such property, without such an indemnity, a Court of Chancery will interfere by injunction. The trustees of a village, in the State of New York, had been empowered, by an act of the legislature, to supply it with water by means of conduits; and for this purpose it was provided that they might enter on lands of individuals, to make reservoirs and lay conduits, and provided compensation only for the owners of the land on the spring, from which the water

¹ *Thatcher v. Dartmouth Bridge Co.*, 18 Pick. (Mass.) R. 501; and see also *Perry v. Wilson*, 7 Mass. R. 393.

² *Sinnickson v. Jackson*, 4 Harr. (N. J.) R. 129.

³ *Stevens v. Prop'rs of Middlesex Canal*, 12 Mass. R. 466.

⁴ *Crittenden v. Wilson*, 5 Cow. (N. Y.) R. 165.

was to be conducted. It was held, that there being no provision made for indemnifying the owners of the land through which the water run, in its natural course, for the deprivation of the water, an injunction would lie to *prevent* any proceeding to divert the water from its natural course, until adequate provision was made for compensating the persons who would sustain loss by the diversion.¹ Again, in the case of Jennings *ex parte*,² the water of a certain river was diverted from a mill and other hydraulic works, the right to erect which was claimed under a legislative grant; and it was held, that the appraisers were bound to appraise damages to the owners of the works; and the appraisers having refused to act, on the ground that the property in the river was in the State, the Court directed that a *mandamus* should issue.

§ 477. The Constitution of Mississippi is explicit as to the *time* when the compensation must be made, and requires that “the compensation shall be *first made*; and under that provision, it has been held, that payment is a condition precedent, and that such payment must precede the seizure for public use; and that any act which authorizes such seizure for public use, without providing such previous compensation is unconstitutional and void.³ The Constitution of New York, and that of other States, does not require that compensation shall be first made; but merely declares that

¹ Gardner v. Newburgh, 2 Johns. (N. Y.) Ch. R. 162.

² Jennings, *ex parte*, 6 Cow. (N. Y.) R. 518.

³ Thompson v. Grand Gulf Railroad Co., 3 How. (Mississ.) R. 240. The Civil Code of Louisiana has provided that there must be the previous indemnity (Civ. Cod. Louis. art. 489); and so did the Code Napoleon, (art. 545.)

private property shall not be appropriated to public purposes without just compensation. In *Rogers v. Bradshaw*, in New York,¹ it was held, that where private property was taken for private use, it was not necessary that the amount of compensation should be actually ascertained and paid before such property was taken and appropriated to the public use ; and both in that case, and that of *Pittsburgh v. Scott*, in Pennsylvania,² it was held sufficient, if a certain and adequate remedy was provided by which the individual could obtain such compensation without unreasonable delay. When the case of *Bloodgood v. Hudson and Mohawk Railroad Company* first came before the Supreme Court of New York,³ that Court held, that the legislature might authorize a railroad company, by their agents, surveyors, and engineers, to enter upon the lands of an individual for the purpose of making a survey and examinations, so as to determine the most advantageous route for the proper line or course whereon to construct their road, previous to their acquiring a title to the lands required for that purpose, or the assessment and payment of damages. It is also held, that the company might enter upon the land in like manner, previous to acquiring title to the land, or having the damages appraised or paying the same. The purchase of the land, it was held, was a condition precedent to the vesting of the fee-simple, but not to the right to enter, and take possession and use the land for the purposes of a railroad. But when this case came under

¹ *Rogers v. Bradshaw*, 20 Johns. (N. Y.) R. 735.

² *Pittsburgh v. Scott*, 1 Barr, (Penn.) R. 309.

³ *Bloodgood v. Hudson and Mohawk Railroad Co.*, 14 Wend. (N. Y.) R. 51.

review in the Court of Errors,¹ that decision was overruled, and it was decided, that it was a condition precedent that the damages should be assessed and paid before the company had any right to enter upon, and actually appropriate the land for the purposes of a railroad. It was not to be presumed the legislature intended, or that it meant to authorize the company to enter upon the land of an individual, pull down his building and other erections, before assessment and payment for the same; or to leave the individual to seek an uncertain remedy by action. The citizen whose property is thus taken from him, is not bound to trust to the solvency of an individual, or even a corporation, for just compensation.²

¹ 18 Wend. (N. Y.) R. 17.

² Chancellor Kent, in a copious note to the second volume of his Commentaries, after citing many authorities in regard to the right of eminent domain, proceeds to say, — “The better opinion is, that the compensation, or offer of it must precede, or be concurrent with the seizure and entry upon private property under the authority of the State. The government is bound, in such cases, to provide some tribunal for the assessment of the compensation or indemnity, before which each party may meet and discuss their claims on equal terms; and if the government proceeds without taking these steps, their officers and agents may, and ought to be restrained by injunction.” 2 Kent, Comm. 339, *note*. He further says, — “The settled and fundamental doctrine is, that government has no right to take private property for public purposes, without giving a *just compensation*; and it seems to be necessarily implied, that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time, with the actual exercise of the right of eminent domain.” It may be remarked that Chancellor Kent has not given the foregoing opinion in view of any constitution requiring, in direct terms, a previous indemnity, but in reference to constitutions containing nothing more than the general provision, that private property shall not be taken for public uses without full compensation being made, and in reference also to the universal principles of justice. But, as was said by Lord C. J. Denman, “frequently the amount of compensation cannot be ascertained *till the work is done*.” *Lisley v. Lobley*, 7 Adol. & Ell. R. 124. For further authorities on this subject, see the note of Chancellor Kent above referred to.

CHAPTER XII.

STATUTES FOR THE ENCOURAGEMENT AND SUPPORT OF MILLS, BY
AUTHORIZING THE OWNERS AND OCCUPANTS THEREOF TO OVER-
FLOW THE LAND OF OTHER PERSONS.

1. As founded on the Doctrine of Eminent Domain.
2. The Provisions of Statutes of different States.
3. Their Effect in abolishing the Common-Law Remedies.
4. The "Public Good," as the Basis of such Statutes, and their broad Provisions and Construction to this End.
5. Do not authorize the overflowing of existing Mills.
6. How and when the Land becomes condemned to be overflowed.
7. How a Mill once used becomes abandoned.
8. Claim for Damages waived by Parol.
9. Prescriptive Right to flow without Payment of Damages.
10. In Respect to Land overflowed which is under the Jurisdiction of another State, or of the United States.
11. Of the Complaint under the Statute of Massachusetts and the Proceedings following it.
12. Of the Complaint under the Statute of Maine and the Proceedings following it.

1. *As founded on the Doctrine of Eminent Domain.*

§ 478. THIS chapter is a protraction of the preceding one, or an additional illustration of the subject of the exercise of the high prerogative of sovereignty of encroaching upon the exclusive right, which every citizen has to use his possessions without the interference of any other person. The contents of the chapter preceding disclose, that if the public interest can in any way be promoted by taking private property, it in a great degree rests in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them

to exercise the right of eminent domain, and to authorize an interference with private rights for that purpose. As it has been said by a distinguished jurist,¹ it has been upon this principle that the legislatures of several States have authorized the condemnation of lands of individuals for mill-sites where, from the nature of the country, such mill-sites could not be obtained for the accommodation of the inhabitants without overflowing lands thus condemned. The statutory law upon this subject, in some of the States, gives the right of flowing *first*, and then imposes on the mill-owner a *subsequent* liability of paying damages, to be afterwards annually assessed; while in other States, the land-owner is divested of his title to the land itself, and the damages therefor are assessed and paid upon, or concurrently with, the grant of a permission to erect a mill.

§ 479. The Supreme Court of the State of New York, (judgment of the court by HAND, J.,) say: "The legislature of this State, it is believed, has never exercised the right of eminent domain in favor of mills of any kind. Sites for steam-engines, hotels, churches, and other public conveniences might as well be taken, by the exercise of this extraordinary power."² But nothing can be more clear, than that legislative acts of this character and for such object essentially promote the good of a community in its progress from a wilderness to cultivation, as was the case with the North American Colonies in the early part of their history, when lands were of comparatively little value,

¹ Chancellor Walworth, in *Beekman v. Saratoga and Schenectady Railroad Co.*, 3 Paige, (N. Y.) Ch. R. 73.

² *Hay v. Cohoes Co.*, 3 Barb. (N. Y.) Sup. Co. R. 42.

and the support of grist-mills and saw-mills was a measure of even vital necessity; and they were consequently encouraged in every possible manner.¹ Mill-sites were, in some instances, appropriated from common lands, by the votes of their proprietors; and mills were often exempted from taxation by the municipal corporations within which they were established. In many instances they were erected in parts of the country still covered by the primitive forests, and where the extent of the flowing, and even the owners of the lands, were unknown.² Even at the present day, in the State of Georgia, the legislature have provided, that whoever will build a grist-mill on land so circumstanced, shall be entitled to the grant of an extensive tract of land, and whoever will build a saw-mill, to a grant of a much more extensive tract.³

¹ 2 Am. Jurist, Art. II.

² 2 Am. Jurist, Art. II. See *post*, § 487.

³ Hotchkiss, Stat. Law of Georgia, 384. The building of mills was in ancient times, in England, encouraged in a different manner. It was then important, says Woolrych, to the settlers in and inhabitants of different districts, that they should have free access to some mill for the purpose of grinding their corn. Lords of manors, for the purpose of meeting the exigency, erected mills on their respective domains for the public advantage; but they fettered the gift with the condition that the inhabitants and residents within their respective seigniories should bring their corn to be ground to the mill so built; and this custom, which thus had a reasonable commencement, was called "doing suit" to the mill. Consequently, whether the millers to whom the respective lords conceded these advantages, make their claims by prescription, which supposes a grant from the lords, or by custom, it appears clear that this old practice arose originally from a sense of general convenience; and in so strong a point of view does this seem to have been considered, that a man might have claimed the suit by prescription, even from the villeins of a stranger. In process of years, when commerce began to spread, and new erections were prospering on every side, many of the tenants and inhabitants, whose ancestors had derived benefit from the ancient mills, began to employ their own

2. Provisions of Statutes of different States.

§ 480. The statutory law in Massachusetts, encouraging mills by authorizing their owners and occupants to overflow the lands of other persons, by paying such damages as may be assessed in the mode prescribed, is ancient. The old Massachusetts statutes speak of mills as *greatly beneficial to the public*; and the preamble of Prov. St. 12 Anne, c. 1, an act for upholding and regulating mills, recites, that they sometimes fall into *despair*, and are rendered useless and unserviceable, if not totally demolished, to the *hurt and detriment of the public*, as well as the loss to the partners who are ready to rebuild. The Prov. St. also of 12 Anne, c. 8, speaks of "mills serviceable to the *public good* and the benefit of the town;" and gives to the mill-owners liberty to continue and improve the pond for their best advantage, without molestation, paying damages for raising the water, &c. These statutes took away the right which before the land-owner possessed of removing from his land a nuisance; and the Prov. St. of Geo. 2, c. 4, gave treble damages for the *trespass* of taking up, breaking down, or damnifying any dam made use of for the inclosing of water improved for the benefit of any mill. In 1795, the provisions of these provincial acts were revised, the act of that year, c. 74, providing

particular workmen, and the old millers found themselves deserted by degrees, by those whose duty it was to have continued their support. They were, therefore, necessitated to seek redress, and the writ of *secta ad molendinum*, or *secta molendini*, was the ordinary remedy which they employed on those occasions. The enforcing of this writ, which is now suspended by the modern action on the case, brought back the inhabitants to the suit, and the service which they owed. Woolrych on the Law of Waters and of Sewers, &c., p. 108.

that the mill-owner may flow *any* lands not belonging to him, (not merely a small quantity, as in the St. 12 Anne,) which shall be found necessary to raise a suitable head of water to work his mill, paying damages, &c. The jury, however, are to determine how far the circumstances of the case do justify such flowing. The St. of 1824, c. 153, provides for the recovery of damages sustained by the owner of the land either above or below the mill; and the St. of 1825, c. 109, gives the mill-owner a right of tendering the amount of damages; thus putting trespass and contract upon the same footing.¹

§ 481. Between the Revised Statutes of Massachusetts, which went into operation in May, 1836, and those which were before in force, there is no substantial difference.² By them it is provided, that any person may erect and maintain a water-mill and dam to raise water for working it, although it may flow back upon lands not belonging to such mill-owner, he being liable for the payment of damages, in the manner specially provided; which is, that any person whose land is overflowed by any dam, may obtain compensation therefor, upon his complaint before the Court of Common Pleas for the county where the land, or any part of it, lies; provided that no compensation shall be awarded for any damage sustained more than three years before the institution of the complaint. The Revised Statutes of Maine, on the subject, are similar,³

¹ See the opinion of Putnam, J., in *Roxbury Mill Dam Company v. Newman*, 12 Pick. (Mass.) R. 467. See also the opinion of Shaw, C. J., in *French v. Braintree Manuf. Co.*, 23 Pick. (Mass.) R. 216.

² Rev. Laws of Mass. ch. 116, s. 4. See the Stat. in the Appx. p. i.

³ See the Rev. Laws of Maine in the Appx. p. ix.

and so also are the provisions of the statute authorizing the flowing of another's land, of Rhode Island.¹

§ 482. In one important respect, the law on the subject of flowing land of North Carolina is similar to that of Massachusetts, Maine, and Rhode Island; that is, it permits the flowing of land first, and then provides for the payment of annual damages.² The 74th chapter of the Revised Statutes of North Carolina, on "mills and millers," puts together in a condensed form all the enactments contained in the acts of 1809, 1813, and of 1833. In describing "the person" authorized and directed to prosecute his complaint in the manner prescribed, the language of the legislature is very broad: "Any person who may conceive himself injured by the erection of any public grist-mill, or mill for *domestic manufactures or other useful purposes*, and be desirous of recovering damages from the proprietor of any such mill, shall apply by petition to the Court of Pleas and Quarter Sessions of the county in which the land, to which the damage is done, is situate, setting forth in what respects he is injured by the erection of said mill." The question arose, in *Waddy v. Johnson*,³ what within the meaning of the legislature, is the case of "damage done to land" by the erection of a mill. The

¹ See Laws of Rhode Island, (Ed. 1844,) and Appx. p. xv.

² A conveyance made to defeat or delay a party injured by the erection of a mill, in the recovery of his damages, is held, in North Carolina, void as to such party, and the owner of the mill, notwithstanding his conveyance of it, continues still liable for the damage. *Purcell v. McCullum*, 1 Dev. & Bat. (N. C.) R. 221. For the statute of North Carolina, and its construction as to complaint and proceedings under it, see *Gillett v. Jones*, 1 Dev. and Bat. (N. C.) R. 389; *Fellow v. Fulgham*, 2 Murph. R. 254; *Wilson v. Myers*, 4 Hawks, R. 73.

³ *Waddy v. Johnson*, 5 Ired. (N. C.) R. 333.

decision of the Court was, that when land is so overflowed, the owner may recover full compensation for all the injury he has sustained thereby, whether it be more or less direct, whether it affect his dominion in the land by taking away its use, or impair the value of that dominion by rendering the land unfit for a place of residence, or whether the injury reaching beyond its immediate mischief, extends also to the person, or the personal property of the petitioner. But the plaintiff must state in his petition in what respect he was injured, and his proofs cannot go beyond his allegations.¹

§ 483. By the statute law of both Virginia and Kentucky, a person owning the land on one side of a watercourse, who proposes to erect "a water grist-mill, or other machine or engine useful to the public," may

¹ *Bridgers v. Purcell*, 1 Ired. (N. C.) R. 232. In a proceeding to recover damages for ponding water by a mill-dam, under the Act of Assembly of North Carolina, the verdict of the jury and the judgment of the Court thereon, are conclusive as to the assessment of damages up to the time when such judgment was rendered. An application for relief from damages, assessed for a period subsequent to the time of the judgment, can only be heard if the dam is taken away or lowered. The washing out of the channel and other causes of a similar kind, furnish no reason for abating the damages. *Beatty v. Conner*, 12 Ired. (N. C.) R. 341. The case of *Pugh v. Wheeler*, 2 Dev. & Bat. (N. C.) R. 50, cited and approved; see as to the latter case, *Ante*, § 427. An executor or administrator has a right to a remedy by petition, under the Act of North Carolina, (Rev. Stat. c. 74,) to recover damages for the overflowing by a mill-pond of his testator's or intestate's land, in the lifetime of such testator or intestate. *Howcott v. Warren*, 7 Ired. (N. C.) Sup. Co. R. 20. So a remedy by petition, to recover damages for flowing a mill-pond, may be had against the executors or administrators of the person who committed the injury. *Howcott v. Coffield*, 7 Ired. (N. C.) Sup. Co. R. 24. In these two cases, the cases of *Gillet v. Jones*, 1 Dev. & Batt. (N. C.) R. 348, *Waddy v. Johnson*, 5 Ired. (N. C.), and *Fellow v. Fulgham*, 3 Mur. (N. C.) R. 254, were cited and approved.

make application to the Court, through which, by appraisal by a jury, he obtains the right to use the opposite bank, and the right to flow the lands of others, provided the flowing does not extend to a house, yard, &c., and be not a public nuisance. The issuing, execution, and return of the writ *ad quod damnum*, to the value of the land, immediately divests the title of the owner of the land, and vests it in the Commonwealth in full and absolute dominion; such owner remaining entitled only to damages assessed by the jury. A grant also by the proper tribunal to erect a dam and establish a mill, (the precautionary proceedings prescribed by the statute having been complied with,) vests in the grantee so much of the public right to the stream as is necessary for the full enjoyment of the mill erected under the order. On an application to add to the height of an existing dam, the only inquiry is, What damages will be occasioned by the proposed addition? and no assessment is to be made of such other damages accruing previously to the alteration, and not contemplated by the original jury.¹ This statute law of Virginia and Kentucky has been substantially adopted in the States of Indiana,² Missouri,³ Mississippi, Alabama,⁴ and Florida.⁵

¹ See the Stat. of Virginia in Appendix, p. xx.; Stat. of Kentucky of 1797, which is an act to reduce into one the several acts concerning mill-dams and other obstructions in watercourses. 1 Stat. Law of Kentucky, p. 606.

² Indiana Laws, 65, (Rev. Code of 1831.)

³ Missouri Laws, 587; *Hook v. Smith*, Misson. R. 225.

⁴ Aik. Dig. Laws of Alabama, 325; Clay's Dig. of Ibid. 376.

⁵ The Act of Florida enacts, that when any person, owning lands in that State, or any watercourse, the bed whereof belongs to himself, may desire to erect a mill, or *other machine or engine of public utility*, and does not own the land on the opposite side thereof upon which to abut a dam,

3. *Their Effect in abolishing the Common-Law Remedies.*

§ 484. The effect of the statutes authorizing the flowing of land not belonging to the mill-owner, and providing a mode for estimating and recovering compensation therefor, take away, as has already been stated, the right which the land-owner *prima facie* possesses of removing from his land a nuisance. For the same reason the only judicial remedy of the land-owner is the one prescribed by the statute, which is substituted for the action on the case.¹ This was so ex-

he may apply for a writ of *ad quod damnum* to the Board of County Commissioners, having given ten day's notice of such application, to the owner of such land, or his agent; and the said Court shall thereupon order such writ to be issued, commanding the sheriff of the county to summon and impanel twelve householders of the county to meet upon the land so proposed for the abutment, on a certain day, to examine the same; *provided*, that nothing in the act shall be construed to interfere with any building, or other structures; and in all cases where there shall be any land condemned, either party aggrieved shall have the right of appeal to the Circuit or Supreme Court of the State. The householders are impartially to view the land proposed for abutment, and to circumscribe by certain metes and bounds one acre thereof, and to appraise the same according to its value, and to examine what other lands, above and below, may be *overflowed* by the erection of the proposed dam and mill, and to ascertain the value of the same; which inquest, when made, shall be delivered to the sheriff, who shall return the same to the Board of Commissioners ordering the writ; and the party applying for the same, shall pay the value of the land ascertained, and the damages assessed, to the person entitled. But in no case is the writ to be granted, if the jury in their report state that the injury likely to result to the neighborhood from the erection of a dam, by sickness or otherwise, will be greater than the benefit to be derived from the same. And if any person thus obtaining permission to erect a mill or other works, fail to erect the same for the space of two years, he shall lose the right which he acquired by said permission. (Thompson's Dig. Laws of Florida, 401, 402.) This Statute, it will be perceived, on comparing it with the Act of Virginia, (as contained in the Appx. p. xx.) is very similar to the Virginia Act.

¹ It is held in Pennsylvania, that a person whose ark is obstructed in

pressly held in Massachusetts, before the enactment of the Revised Statutes, on the ground, that from a general purview of the acts authorizing flowing, made expressly to relieve mill-owners from the difficulties and disputes to which they were before subject, there could be no doubt of the intention of the legislature to take away the action at Common Law; an action which might be renewed for every new injury, and so harass the owner of a mill with continual lawsuits.¹ The object of the Massachusetts Act of 1795 has been construed to be twofold: first, to give a remedy for damages already sustained; and secondly, to establish a measure of damages for the future.² But by the Revised Statutes of Massachusetts, (c. 115, s. 30,) and by those of Maine, (c. 126, s. 28,) it is expressly enacted that no action can be sustained at Common Law for erecting or maintaining any mill or dam, except in the special cases provided to enforce the payment of damages, after they have been ascertained by the process of complaint. The Supreme Court of Massachusetts

Penn's Creek, cannot use the Common-Law remedy of abatement, but must pursue the remedy pointed out by the Act of Assembly. *Spiglemoyer v. Walter*, 3 Watts & S. (Penn.) R. 540; and the erection of a mill-dam across a navigable stream, by the owner of the land through which it passes, is held in that State not a public nuisance to which the Common-Law remedy of abatement may be applied, the appropriate mode of redress being under the provisions of the act of the legislature. *Criswell v. Clugh*, 3 Watts, (Penn.) R. 330. But if a statute gives a remedy in the affirmative (without a negative expressed or implied) for a matter which was actionable by the Common Law, the party may sue at Common Law, as well as upon the statute. *Com. Dig. Action upon Statute (C.)*; *Crittenden v. Wilson*, 5 Cow. (N. Y.) R. 165.

¹ *Stowell v. Flagg*, 11 Mass. R. 364.

² *Commonwealth v. Ellis*, 11 Mass. R. 464. And see *Woolcot Manuf. Co. v. Upham*, 5 Pick. (Mass.) R. 292; *Walker v. Oxford Woollen Man. Co.* 10 Met. (Mass.) R. 203.

held in 1849, that the remedy by assumpsit or debt, given by the Revised Statutes, (c. 116, s. 24,) to enforce payment of the annual compensation or gross damages, awarded under the provisions of the same chapter, for the flowing of land for the purposes of a mill, is not cumulative, but is substituted for, and takes away, the Common-Law remedy by an action on the judgment; and that such action can only be brought against the owner or occupant of the mill, and it must be alleged in the declaration, that the defendant is such owner or occupant.¹ Although not so expressly provided by the statute of flowing of North Carolina, as by the statutes of Massachusetts and Maine, its

¹ Leland v. Woodbury, 4 Cush. (Mass.) R. 245. The point decided in 1846, in Hill v. Sayles, 12 Met. (Mass.) R. 143, upon the complaint under the Massachusetts Act, was, that the dam raised by the defendant, for a head of water for working his mill, should not be kept up so as to flow the defendant's meadow during a certain portion of the year. This was within the jurisdiction of the jury by statute, and their finding is conclusive. Subsequently, in 1849, in a suit between the same parties, held, (4 Cush. R. 549,) that the verdict of a sheriff's jury, having restricted a mill-owner from keeping up his dam and flowing the land above during certain months in the year, he is liable to the land-owner, in an action at common law, for flowing the land during those months; although he cause such flowing through a canal cut by him by the side of a stream, after the verdict, instead of causing the water to flow back in the natural stream, as it flowed before the verdict; and that it is no defence to such action to show, that the flowing complained of was not occasioned by the *particular structure*, which occasioned the obstruction at the time of the trial by the sheriff's jury, and which the jury had in view in giving their verdict, but a different one; that the new channel dug by the defendant was of greater capacity, and would carry off the water more freely and fully from the plaintiff's land, than the old channel, and was kept open during the months specified in the verdict; or, that since the verdict of the jury, the defendant had added a large amount of machinery to his mills. It is not any particular structure of stone, wood, or earth to be kept open, to which such a judgment applies; it applies to any contrivance, made to raise a head of water, the effect of which is to immerse the complainant's meadow during summer.

main object has been construed to be to restrain a malicious exercise of the Common-Law right of action. "Suits," says GASTON, J., "were common between the owners of adjoining lands and the proprietors of mills, because of the lands of the former being drowned by the mill-ponds of the latter. For the slightest, as well as the most serious injury of this kind, the remedy was the same, an action on the case repeated time after time, until the nuisance was put down, or one or the other of the parties ruined in the controversy. It was unquestionably because of the mischief, real or supposed, which were disclosed by suits of this description, that the legislature interfered by providing a new remedy, which it was their will should be pursued instead of the former one."¹

§ 485. In reference to the statute of flowing of Alabama, the Supreme Court of that State, in giving judgment in *Hendricks v. Johnson*,² take occasion thus to speak in relation to the *remedy*: "Instances were rare, in which mills could be erected without subjecting their owners to consequences which might prove ruinous, and the statute was evidently enacted to obviate this mischief, existing in the Common Law. For this reason, the first act was entitled 'An act to encourage the building of public mills, and directing the duties of millers.' It was enacted as early as 1811, by the then territory of Mississippi; and the general provisions of this act are similar to those now in force, which was enacted in 1812, and which is only an amendment of the former act. Neither the one nor the other con-

¹ Per Gaston, J., in delivering the judgment of the Court in *Waddy v. Johnson*, 5 Ired. (N. C.) R. 383.

² *Hendricks v. Johnson*, 2 Port. (Ala.) R. 472.

tains any provision by which the person acting under it is directly promised any immunity from prosecutions or actions, nor are the rights of any proprietor to the uses of the stream of water directly divested by these enactments. Yet such must have been the intention of those who framed these acts, for otherwise no conceivable object could be obtained by them, and no encouragement would be held out to build public mills, according to the title of the act, if those erecting them were to continue subject to the onerous provisions of the Common Law."

§ 486. But it is expressly provided by the Virginia and Kentucky statutes, and the statutes of other southern and western States modelled, in this, as well as in other respects, after the former, that a license duly obtained to erect a mill, after the inquest of the jurors, will afford no bar to an action for injuries that were not actually foreseen and estimated by the inquest.¹ The construction given to the statutes of Massachusetts and Maine, authorizing lands to be flowed situated above or *below* any mill-dam, do not authorize a mill-owner to make a canal or artificial stream in such a manner as to lead the water into the lands of another person; and therefore, the remedy of the party whose land is thus flowed, is, by an action at Common Law.² Under those statutes also, when the time during which a mill-dam may be kept up is restricted, by the verdict of a sheriff's jury, to certain months in each year, and the mill-owner keeps it up during the other months of

¹ Commonwealth v. Faris, 5 Rand. (Va.) R. 691.

² Fiske v. Framingham Manuf. Co. 12 Pick. (Mass.) R. 67. See Riley v. Park, 11 Met. (Mass.) R. 424.

the year, and thereby flows another's land, he is liable to the land-owner in an action at Common Law, for the damage done by such flowing;¹ and so where a mill had been abandoned, but the dam kept up, an action at Common Law was held to lie.² The remedy for a town against a mill-owner, who overflows a road which the town is obliged to repair, and does repair, is an action on the case, and not by a complaint under the statute.³

4. *The Public Good as the Basis of such Statutes, and their broad Provision and Construction to this end.*

§ 487. An opinion has been entertained by some persons, that the enactment of the above statutes is an abuse of the right of eminent domain, an infringement of the spirit of the Constitution, and not within the powers delegated by the people to the legislature; though mills might with propriety have been considered public easements, and as of public convenience and necessity, in the first settlement of the country.⁴ The observation was made by the late Chief Justice PARKER of Massachusetts — when speaking of the statutory law of that State subsequent to the Revolution, by which was reënacted in substance the provincial acts to which we have referred — “We cannot help thinking,” says he, “that this statute was *incautiously*

¹ Hill v. Sayles, 12 Met. (Mass.) R. 142; Johnson v. Kittredge, 17 Mass. R. 76.

² Baird v. Hunter, 12 Pick. (Mass.) R. 556.

³ Andover v. Sutton, 12 Met. (Mass.) R. 182; and see Commonwealth v. Fisher, 6 Met. (Mass.) R. 433; Commonwealth v. Stevens, 10 Pick. (Mass.) R. 247.

⁴ Am. Jurist, Vol. 2, p. 80. See ante, § 479.

copied from the ancient colonial and provincial acts, which were passed when the use of mills, from the necessity of them, bore a much greater value, compared to the land used for the purposes of agriculture, than at present.”¹ The real question is, whether authorizing the flowing of another’s land is sufficiently for the public good to justify depriving the owner of the use of it, even for a just compensation; as it is not pretended that the legislature can take the property of one individual, and, without his consent, give it to another, even for a fair compensation.² It seems, however, to be abundantly well settled, that it is sufficiently for the public good; for the statutory law, of which we have given an account, has too long been engrafted in the jurisprudence of the States in which it has been enacted, revised, and amended, through a long course of legislation, and too steadily sustained by judicial sanction, to be now declared not to be within the eminent domain of the government. More especially should this long and uninterrupted public acquiescence be deemed conclusive, when it is considered that the line of demarcation between a use that is public, and one that is strictly and entirely private, is a line not easily drawn. Such considerations as these appear to have had much influence with the Court in giving judgment in the case of the Boston and Roxbury Mill-Dam Corporation *v.* Newman,³ in which case it was held, that the construction of dams by a corporation, for obtaining the head and fall of the waters of

¹ *Stowell v. Flagg*, 11 Mass. R. 364.

² See *Ante*, § 467, *et seq.*

³ *Boston and Roxbury Mill-Dam Corp. v. Newman*, 12 Pick. (Mass.) R. 467.

a navigable stream and *working mills*, was such a public enterprise as authorized the legislature to appropriate private property thereto. The Court, in giving judgment, after referring to the various mill acts of Massachusetts, say, — “It is certainly apparent, that the legislature have considered it for the public good to encourage the erection of mills, and have subjected the property of the citizens to the control of the mill-owners, they paying the damage. In these cases the damage has been sustained by reason of the flowing of the lands. But in the case at bar, the damage is in laying bare the flats of the tide-water, so as to make a fall for the water into the pond or full basin. But we do not perceive that there is any difference in the principles applicable to the two cases. The object in each is to get a head and fall for mill purposes.” Chief Justice SHAW, in giving the judgment of the Court in *Fiske v. Framingham Manufacturing Company*,¹ and in reference to the earlier statutes of Massachusetts for the encouragement and support of mills, says, — “They are somewhat at variance with that absolute right of dominion and enjoyment which every proprietor is supposed by law to have in his own soil; and in ascertaining their extent, it will be useful to look into the principle upon which they are founded. We think they will be found to rest for their justification, partly upon the interest which the community at large has in the use and employment of mills, and partly upon the nature of the property, which is often so situated that it could not be beneficially used without the aid of this power. In Tennessee it has been held, that

¹ *Fiske v. Framingham Manuf. Co.*, 12 Pick. (Mass.) R. 67.

the legislature might make grist-mills public mills, and authorize the condemning the lands of individuals for the use of such mills, providing compensation for the lands.¹

§ 488. Indeed the legislature, as well as courts of law, seem to have been disposed rather to enlarge, than to curtail, the statutory privileges of mill-owners.² First, we have seen, that the origin of the mill laws in Massachusetts, as to flowing, was to encourage and sustain *grist* and *saw*-mills, and not other machinery moved by water, for other purposes. But by the Revised Statutes of Massachusetts,³ and by those of Maine,⁴ the owner of *any* water-mill is invested with the privileges in question; and "it may not be certain," says a learned Judge, "that, with the greater demand and increase in machinery of all kinds, the words should not have a broader construction than the original subject-matter."⁵ In other portions of the United States, the policy has been to legislate full as broadly on this subject. The statute authorizing the taking of private property for flowing in the State of Florida, extends to all who "may desire to erect a mill, or *machine*, or *other engine of public utility*;"⁶ that of North Carolina, to mills, and to "mills for *domestic*

¹ *Harding v. Goodlet*, 3 Yerg. (Tenn.) R. 41.

² See note to *Stowell v. Flagg*, 11 Mass. R. 366, (Edit. 1848.)

³ App'x, p. i.

⁴ App'x, p. ix.

⁵ Per Woodbury, J., in *United States v. Ames*, 1 Woodb. & Minot, (Cir. Co.) R. 87. The Act of Tennessee, of 1777, does not authorize the condemnation of land for the erection of a *grist*-mill, *saw*-mills, and *paper*-mills; it extends only to the condemnation of lands for *grist*-mills. *Harding v. Goodlet*, 3 Yerg. (Tenn.) R. 41.

⁶ Thomp. Dig. Laws of Florida, 401.

manufactures ;"¹ and that of Indiana, to any "water grist-mill, saw-mill, or *any other machinery to be propelled by water.*"² If a *blacksmith's shop*, in which the bellows is worked by a water-fall, can be considered a mill, yet, if there is only a right to use the water for that purpose at the will of the owners of the dam, the owner of the shop is not liable to the payment of damages for the flowing of the water. The shop would not be a mill for whose use the water was either raised or continued.³

§ 489. Secondly; a broad construction has been given to the statutes of Maine and Massachusetts, with respect to the privilege of creating *reservoirs* remote from, but auxiliary to, the pond lower down. A reservoir of this kind, and for the purpose of raising and *preserving* the water for the use of mills lower down on the stream, and carried by other water-falls, has been held in Maine to be within the statute for the support and regulation of mills; and the only remedy for overflowing the land of others, by means of such reservoir, is by proceeding pursuant to the statute.⁴ In *Woolcot Manufacturing Company v. Upham*, in Massachusetts,⁵ the reservoir for the use of the mill was erected more than three miles from the pond at which the mill was situated; and it was held, that the owner of the land lying between the two dams, which was overflowed by the water from the reservoir, must apply for damages in the mode provided by the statute. The Court

¹ See *Waddy v. Thompson*, 5 Ired. (N. C.) R. 333.

² Rev. St. Indiana, s. 1.

³ *Nelson v. Butterfield*, 8 Shepl. (Me.) R. 220.

⁴ *Ibid.*

⁵ *Woolcot Manuf. Co. v. Upham*, 5 Pick. (Mass.) R. 292.

thought it very common, that two or *more* ponds were required for a mill, though they were not often so remote from each other as in this instance. If the owner of a mill erects a dam at the outlet of a natural pond, which flows into the stream upon which his mill is situated, for the purpose of creating a reservoir for the use of his mill, the owner of land flowed by means of such dam cannot maintain an action at common law therefor, but must proceed in the manner provided by the Massachusetts' Mill Act, c. 116 of the Revised Statutes.¹

5. *Do not authorize the flowing of existing Mills.*

§ 490. In Massachusetts, before the Revised Statutes, a lower proprietor on a stream was not allowed, under the construction of the former statutes, to raise a dam (without a right acquired by grant, prescription, or actual use) so as to destroy a mill of an upper proprietor which he has actually built, or is engaged in building.² The Revised Statutes of Massachusetts, of 1836, expressly enact, that no dam shall be erected to the injury of any mill lawfully existing above or below it, on the same stream, nor to the injury of any mill site on the same stream, on which a mill or mill-dam shall have been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site, shall have been lost or defeated by abandonment or otherwise; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance,

¹ *Shaw v. Wells*, 5 Cush. (Mass.) R. 537; *Bradley v. Rice*, 1 Shep. (Me.) R. 198, and see *ante*, § 41.

² *Bigelow v. Newell*, 10 Pick. (Mass.) R. 348; *Hatch v. Dwight*, 17 Mass. R. 289; *Cook v. Stearns*, 11 Mass. R. 533.

or authority from the owner, as would be necessary by the Common Law, if no provision relating to mills had been made by statute. Under this provision it has been held, that where a riparian proprietor has commenced the erection of a mill, — where none had existed previously, — and before it is finished, a lower proprietor began and completed a mill-dam, whereby the privilege of the upper proprietor is destroyed, the erection of the dam by the lower proprietor is lawful; and the upper proprietor cannot maintain an action on the case for the injury, but his remedy must be by complaint under the statute.¹ It appeared in evidence in this case, that the dam of the lower proprietor was erected in April, 1837, and the mill of the upper proprietor was not completed till December after; that the upper proprietor's race-way from his brook for the purpose of procuring a head of water, was not begun until September or October of the same year; and that the upper proprietor's mill site was one on which a mill or mill-dam had never before been erected and used; so that, in the opinion of the Court, the case was not within the true meaning and express words of the statute.

§ 491. Under the earlier laws of Massachusetts, it was never determined whether, as a general right, and under what circumstances, limitations, and conditions, a lower² proprietor on a watercourse may raise a dam so as to obliterate and submerge a fall higher up, and thereby *prevent* the erection of a mill on a suitable site;² and whether it is competent for a mill-owner, under

¹ Baird v. Wells, 22 Pick. (Mass.) R. 312.

² See Bigelow v. Newell, *id. sup.*

the Revised Statutes, to flow another's lands, having dwelling-houses, or other buildings upon them, has never been distinctly decided.¹ *Mills* are at all events protected by the statute; and if a riparian proprietor has fully completed his dam and mill, the statute authorizes him to maintain it; though if an upper proprietor places a dam on that part of his land which is already flowed by a dam below, he does it in his own wrong.² Unless a mill is built in connection with a dam, or *the party has an intent forthwith* to erect such mill, he is not a mill-owner within the purview of the statute, and is liable at Common Law only for flowing others' land by means of such dam.³

6. *How and when Land becomes condemned to be overflowed.*

§ 492. According to the obvious meaning and intent

¹ See opinion of Shaw, C. J., in *French v. Braintree Manuf. Co.*, 23 Pick. (Mass.) R. 216.

² Ibid.

³ *Fitch v. Stevens*, 4 Met. (Mass.) R. 426. Whether under the Mill Act of Rhode Island, which was in existence in 1885, a mill-owner might raise his dam, so as to affect any water privilege already on the stream, and above his run, Mr. Justice Story, in *Mann v. Wilkinson*, (2 Sumn. Cir. Ct. R. 273,) observed, —“Nor have they” (the plaintiffs) “averred, that they have acquired any right to the same by operation of law, by the flowage of the same under the Mill Act of Rhode Island. If it had been averred in the pleadings, and established in proof, that the plaintiffs set up such a right to the eel-dam by flowage, under the Mill Act of Rhode Island, then a very important question might have arisen, whether, under that act, it was competent for any mill-owner to raise his dam so as to flow back upon and affect any water privilege or dam, already in existence across the stream above his mills; or whether the right of flowage is confined to cases where no dam is erected, or in the course of erection, and the only flowage is mere land.” Upon this question the learned Judge gave no opinion, as it was not raised by the pleadings. In regard to this particular subject under the Mill-Dam Act of Rhode Island of 1844, see Appx. xv.

of the statutes authorizing the overflowing the lands of others, for the encouragement of the erection and support of mills, an *inchoate* right to the privilege of flowing, according to the provisions of the statute, is acquired by commencing a dam. But unless the work is proceeded in to complete the dam, and a mill in connection with it, the party does not become entitled, as mill-owner, to the privilege in question. No person can avail himself of the privilege of a mill-owner *merely* by erecting a dam ; and the question is a proper one for the consideration of the jury, whether there is a *bonâ fide* intention to erect, without unreasonable delay, a mill to be operated by the water raised by the dam.¹

§ 493. Under the first section of the Statute of Alabama, which is explicit, that any person owning the land on one side of a watercourse, may make the application for building a mill ; and under the fifth section, which prescribes that the same form shall be pursued when the applicant is the owner of land on both sides ; if none of the matters appear by the inquest or other evidence, which authorizes the Court to decide against the application, the leave must be granted, and as to all other matters, they become questions of compensation, and must be determined as such. It is held, that from this it results, that the *first applicant* acquires an *inchoate* right to the privileges which are conferred by the statute ; and provided he proceeds in the case, with reasonable diligence, he is entitled to a decree establishing his mill. Where one begins the erection of a mill and completes it, after the application of another, for the writ of *ad quod damnum*, and for the purpose of

¹ Hatch v. Dwight, 17 Mass. R. 289.

defeating the right acquired by the application, he is entitled to no consideration if his mill be overflowed, and to no redress against the party who was proceeding lawfully to obtain a confirmation and establishment of his mill. But although the application may thus give the inchoate right to him who first applies, it can only be made complete and operative by the judgment rendered in the case, and not even then, unless every condition required by the judgment is complied with.¹

§ 494. In *Fitch v. Stevens*,² in which the action was founded on the Revised Statutes of Massachusetts,³ it appeared that in the spring or summer of 1836, Stephen Stevens built a dam on his own premises, but never erected a mill upon it; that in 1837, the plaintiffs instituted their complaint against him for flowing their lands in consequence thereof; and that afterwards, in 1838, Jonathan C. Stevens, the defendant, built a saw-mill on his own land, about half a mile below the dam in question, and drew water from the pond raised by it, by means of a trench, for the driving of his mill. The Court held, that, upon these facts, the complaint for flowing was prematurely brought, and that an action would have well lain at Common Law. "And however," said the Court, "it might have been, if the dam and mill had been built at the same time, though by different persons, yet here no intent was proved on the part of Stephen Stevens to erect a mill at any time; none was erected on his land, and the space of two years actually intervened between the building of the

¹ *Hendricks v. Johnson*, 6 Port. (Ala.) R. 472.

² *Fitch v. Stevens*, 4 Met. (Mass.) R. 426.

³ See Appx. p. i.

dam by Stephen, and the erection of the mill by Jonathan C. on his own land. We come to the conclusion, therefore, that Stevens was not liable, at the time of the filing of the original complaint, to be proceeded against under the statute, and that if he had pleaded in bar to the process, he would, under the facts as now presented, have prevailed in his defence. And whatever might have been the decision, if the complaint had been filed against both Stephen and Jonathan C. after the erection of the mill, as the case now stands, we consider the proceedings void as against the present defendant, because Stephen Stevens neither built nor occupied the mill; and it is open to the defendant to take the objection that the original party was not liable, and that he is not bound by the verdict and judgment against Stephen, being neither party nor privy to it.”¹

§ 495. Under the Statute of Virginia, after a County Court has granted leave to one applicant to build a mill, if application be made by another to build a mill lower down upon the same stream, and the party who first obtained leave, shows that the dam for the second mill would be several feet higher than the fall between the two mill sites, and would, if built, destroy the privilege previously granted to him, the Court, in the exercise of a sound discretion, ought to refuse the second application.²

¹ In 1841, it was expressly enacted by the legislature of Massachusetts, that no dam shall be thereafter erected to the injury of any *mill site* on the same stream which shall have been occupied as such by the owner thereof, provided such owner shall, within a reasonable time after commencing such occupation, complete and put in operation a mill, for the working of which the water of such stream shall be applied. Supp. to Rev. St. of Mass. 184.

² *Hulmes v. Shugart*, 10 Leigh, (Va.) R. 332.

7. *How a Mill once used becomes abandoned.*

§ 496. Although a riparian owner has no right, under the statute, to flow back to the injury of an existing mill of another above, yet if the mill and mill site above are abandoned and left unoccupied, the rule does not apply. And the owner of a mill privilege on which a mill has formerly stood, but on which no mill is actually standing, is entitled to an action against any one, who, by erecting a dam below, renders the site useless for the purpose of erecting a mill; unless the owner has abandoned it *with an intention* to leave it unoccupied.¹ It may be impossible always and at all times, after a mill has been erected and the statute has attached to it, to keep the water flowed to the requisite height, and to keep the mill in constant operation; the dam may be carried away by floods, the mill destroyed by fire, or both become dilapidated with age and wear. In all these cases, it may be necessary to take away the remains and rebuild. But it would be wholly inconsistent with the nature of the right granted, and with the objects and purposes of such a grant, to hold, that because the dam is temporarily removed, parties holding lands on the stream above or below are remitted to their original rights, and the statute right of the particular mill is extinguished. Therefore, some time must be allowed to the mill-owner to repair his dam and replace his mill; but, when no time is fixed by law, it must be a reasonable time, and what that is, must depend upon the circumstances of the case. If

¹ Hatch v. Dwight, 17 Mass. R. 289; Hodges v. Hodges, 5 Met. (Mass.) R. 205; Fuller v. French, 10 Met. (Mass.) R. 359.

all the circumstances bearing upon the question are admitted or proved, it must be deemed a question of law to be decided by the Court.¹

§ 497. An express declaration by the owner of a mill site which has been occupied by him, that it is no longer his intention to keep up the mill, accompanied with corresponding acts, such as removing the dam and mill, and giving notice of such intention to those whose lands he has flowed, and to whom he has paid damages, will be deemed an abandonment and extinguishment of the privilege.²

§ 498. If the owner of a mill site cease to use the same for an unreasonable length of time, the privilege is thereby lost; and the entire and continued disuse of such mill site for twenty years, is strong *prima facie* evidence of a non-user for an unreasonable length of time; and unless rebutted by clear and satisfactory proof, it is conclusive.³

§ 499. Where a mill-owner suffers his mill and dam to go to decay, and ceases to flow the land until a highway is made across the land, it is an abandonment; and he cannot, by granting his mill privilege and right to flow, authorize his grantee to overflow such highway by means of a new dam on the site of the old one.⁴

8. *Claim for Damages waived by Parol, &c.*

§ 500. The claim of a complainant, under the statute,

¹ Opinion of Shaw, C. J., in *French v. Braintree Manuf. Co.*, 23 Pick. (Mass.) R. 216.

² *French v. &c.*, *ub. sup.*

³ *Ibid.*

⁴ *Commonwealth v. Fisher*, 6 Met. (Mass.) R. 433.

to recover damages for flowing his land, by means of the respondent's mill-dam, is a demand for money pursued in a special form adapted by the legislature to the particular case, and, therefore it has been held, it may be waived by *parol*.¹ In *Seymour v. Carter*,² there was a complaint and petition for a jury to assess damages done by the respondent's flowing the complainant's land, which the respondent claimed a right to flow without compensation. To prove this right, the respondent introduced the testimony of a witness who built the dam in 1825, and conveyed it to the respondent in 1831, and who deposed, that before the dam was erected, the complainant requested and urged him to build it and erect a mill, for the benefit of the neighborhood, and promised that if it should overflow his land, he would not demand any damages; and there was also other evidence which established the same fact. The Court said:—"The respondent, a mill-owner, relies upon no grant or license from the complainant, either to erect or maintain his mill on his own land. The right was fully given him by law. The St. of 1795, c. 74, § 1, in force when this mill was erected, declares, that 'it shall be lawful for the owner of such mill to continue the same head of water to his best advantage;' giving the owner, whose lands are thus flowed, a special remedy for his damages in money. But it seems very clear, that it is a good defence to a claim for a sum of money, that it has been paid or satisfied by agreement, or waived; and that proof of pay-

¹ *Clement v. Durgin*, 5 Greenl. (Me.) R. 9. Although an *easement* in land cannot be created by *parol*. See *Ante*, § 286 - 295.

² *Seymour v. Carter*, 2 Met. (Mass.) R. 520.

ment, accord and satisfaction, or waiver, may be proved by parol."

§ 501. Upon a complaint to the regularly established tribunal by the owner of land overflowed by a mill-dam, against the owner of the dam, the latter may not only set up a right to overflow it without payment of damages, or for an agreed composition, but may traverse the complainant's title to the land overflowed, or deny that he himself is owner of the dam, or that the complainant has sustained any damages; and if issue be joined upon either point, an appeal lies, in Massachusetts, to the Supreme Court; although it is otherwise where the *quantum* of damage is the only question.¹

§ 502. The difference between a waiver of a claim for mere pecuniary damages by parol, and an oral license to erect and continue a dam on one's own land, is, that the latter, under the statute of frauds, is of no legal validity, as against a subsequent grantee of the land.² In Maine, it is held, that a permanent right to overflow the land of the complainant, under the statute, without paying damages, cannot be established by proof of a parol agreement made with his grantors;³ for, say the Courts of that State, "in the case of flowing, the owner of the land flowed can maintain no process, unless he has sustained damages in his lands by being flowed; the Common-Law remedy is taken away, and the only remedy for redress is by this process of complaint; the owner's hands are tied; the flowing may continue without license, till damage is sustained;"

¹ Lowell v. Spring, 6 Mass. R. 398.

² Stevens v. Stevens, 11 Met. (Mass.) R. 251. That no interest in land can be acquired by parol, see Ante, § 387.

³ Seidensparger v. Spear, 5 Shepl. (Me.) R. 123.

although, *generally*, "the law gives a right of action, and even if no actual damages are found, the action will be sustained, and nominal damages recovered."¹ In any event, the license is good only between the *original parties*. "It would seem," say the Court, in *Seidensparger v. Spear*,² "to be imperiously required of courts of justice not to relax the rule of law as to the effect of licenses by parol, or as to the extent of presumptions against the lawful owner's right. It is so easy a thing for one, who would secure a right to flow another's land, to obtain a deed conveying that right for such length of time, and to such height and extent as may be agreed upon, that it may be regretted that any dispensation with such a requisition, should in any degree be tolerated, considering the temptations to misrepresent, or to forget what transpired in years gone by, when the whole rests merely in recollection, without being reduced to writing."³

§ 503. The general ground upon which the above-mentioned case of *Carter v. Seymour* was decided, has been explained to be, that "nothing then appearing showed that any easement or privilege in favor of the mill-owner had been created in or over the estate of Seymour. If there was no service due to the estate of the mill-owner, there was none due from the estate of the land-owner. If it was subject to no such service, it was under no encumbrance. The case proceeded on the ground that the act of the mill-owner was the ex-

¹ *Hathorne v. Stimson*, 3 Fairf. (Me.) R. 183.

² *Ub. sup.*

³ For the validity of Parol Licenses in general, and for a full consideration of the interest conveyed by them, see Ante, Ch. VIII. And for their effect in particular as relates to flowing land, see Ante, § 387.

• exercise of a statute right; that the right of Seymour was to demand a sum of money, as owner, for the time being, of the land flowed; that this was a mere personal right, which might be discharged or waived by parol; and that this personal right, both as against the original builder of the mill and his successor, was thus waived. But if the statute gives the right to each successor of the land flowed to claim annual damages, then Seymour's grantee has that right. He is barred by nothing which Seymour has done. But it is said, that it would be gross injustice, which the law will not warrant, after Seymour encouraged Jones to build the mill, and waived damages for flowing, because the mill would be for the benefit of his estate, if Seymour's successor can now claim damages of the mill-owner. It may be very unjust for Seymour's grantee to take the estate thus benefited, and to demand any damage. But the true answer is, that the agreement, if it extended to future damages, could not bind the estate, because it was not in writing."¹

9. *Prescriptive Right to flow without Payment of Damages.*

§ 504. It has been rendered very clear, in a pre-

¹ *Fitch v. Seymour*, 9 Met. (Mass.) R. 462. In this case A orally requested B to erect a mill-dam, and orally promised him, that if the dam should flow his land he would not claim damages for the flowing. B built a dam and mill, and flowed A's land, and afterwards conveyed the dam and mill to C, who continued to flow the land. A entered a complaint against C to recover damages for this flowing, and it was decided that he had waived his right to damages, by his agreement with B, and could not recover. A afterwards conveyed his land to D, with a covenant that it was free from all encumbrances, and D brought an action against him for breach of this covenant, alleging the right of C to flow the land without payment of damages. It was held, that C had no such right as against D by virtue of A's oral agreement with B.

ceding chapter,¹ that to raise a dam on one's own land, by which the water is set back on another's, is a tort, for which an action at Common Law would lie; and it has been, in another chapter,² rendered equally clear, that if such a dam is continued for twenty years, *as of right*, and without action or protest, on the part of the land-owner, it is evidence of a right, or presumptive evidence of an express grant. The question then is, whether these principles are applicable to the case of flowing as regulated by the statutes now under consideration. The case of *Williams v. Nelson*, in Massachusetts,³ was a case upon the statute of that State, for flowing by the mill-dam of the respondents, and the very question presented was, whether they could defend, by showing that they had kept up their mill-dam and flowed the land in question more than forty years, without payment or claim for damages on the part of the then complainant, or those under whom he claimed. The Court gave this opinion: "Where a mill-owner and his predecessors have in fact enjoyed and exercised the right of keeping up his dam and flowing the land of another, for a period of twenty years, without payment of damages, and without any demand or claim of damages, or any assertion of the right to damages, it is evidence of a right to flow without payment of damages, and will be a bar to such claim." So under the Act of Virginia, the payment of damages assessed may be presumed, if much time has elapsed

¹ Ante, Chap. X.

² See Ante, § 216 - 224, 372 - 387.

³ *Williams v. Nelson*, 23 Pick. (Mass.) R. 141.

during which the owner of the land has acquiesced in the building of the mill, without any claim on his part.¹

§ 505. The above decisions seem to be opposed, however, by that in *Tinkham v. Arnold*, in Maine,² which was, that the undisturbed enjoyment of any known legal right, such as the flowing of lands for the support of mills, for any term of time, furnishes no presumptive evidence of a grant. It went upon the ground, that as the erection and continuance of the dam was *lawful* and *rightful*, and made so by statute, neither the erection nor continuance of it could be considered as proof of a grant, because they might be as well done without grant. But in answer, it may be said, that it sometimes happens, that a right may be acquired, and a grant presumed, where there is no actual use made of the land of another, and where, therefore, the owner could bring no action, during the time the privilege is used, which, after a certain length of time, is taken to be evidence of a grant. Of this nature is the enjoyment of light in a house. The owner does no act upon the property of another, for which an action would lie; he has a right to the light as it comes to him over the land of another, and yet an enjoyment for twenty years gives a right, and raises the presumption of a grant.³ The case of a land-owner against a mill-owner, is considered in some respects similar. The former could maintain no action, simply for erecting and keeping up the

¹ *Young v. Price*, 2 Munf. (Va.) R. 534.

² *Tinkham v. Arnold*, 3 Greenl. (Me.) R. 120.

³ See *Ante*, § 204, 244, 309, 314.

dam; but he could file and prosecute his claim for damages, or he could make his claim *in pais*, and thus rebut the presumption of a grant from mere enjoyment. The mill-owner, by force of the statute, may raise and maintain his dam without grant or license of the owner of the land flowed by it; but he cannot maintain it free of all claim for damage; and if he maintains it twenty years free of all claim for damage, it seems to warrant the legal presumption of a grant or other lawful origin of such right, and establishes the right upon the principle of presumed grant.¹

§ 506. With regard, however, to the case of *Tinkham v. Arnold*, the report of the case does not make it appear, whether the owner of the land flowed *suffered any damage*; and the language used by the Court may require to be limited and applied to the time during which *no* damages were occasioned by the flow of the water.² However true it may be and is, that, by the Common Law, an action may be maintained for causing the overflowing of another's land, although no actual injury be proved;³ yet in *Stowell v. Flagg*,⁴ the Court held, that the process is given by the acts in relation to flowing "only to those who have actually suffered damage." The Court expressly held in *Hathorne v. Stinson*,⁵ that inasmuch as the Common-Law right to maintain an action against the mill-owner for flowing his neighbor's land, is taken

¹ Such is the reasoning of C. J. Shaw, in *Williams v. Nelson*, *ub. sup.*

² *Nelson v. Butterfield*, 8 Shep. (Me.) R. 220.

³ See *Ante*, § 426 - 433.

⁴ *Stowell v. Flagg*, 11 Mass. R. 364.

⁵ *Hathorne v. Stinson*, 3 Fairf. (Me.) R. 133.

away by the statute, and the statute affords no remedy except in those cases where damages have been actually sustained, the continuing to flow, under such circumstances, ought not to prejudice the title of the owner of the land thus flowed; because his hands are tied, and he can neither resort to his action at Common Law, nor to process under the statute.¹ In another case in Maine, of a complaint under the statute of flowing, the report stated, that there was no evidence that any portion of the land in question had been fenced in, and there was no testimony tending to prove, that profit could be derived from the land, or that it could be injured by the flow of the water. The case, the Court said, therefore fell within the class of cases, upon which they, after mature consideration, decided, that while the owner of the land suffers no damage, and can, therefore, maintain no suit or process, or in any way prevent such flowing, he cannot be presumed to have granted or in any manner to have surrendered or relinquished any of his legal rights. But where damages have been occasioned by the flowing, and the owner of the land flowed has had the power to maintain a process to recover them, the Court held, that a prescriptive right to flow the land, without payment of damages, may be acquired.²

10. *In respect to Land overflowed, which is under the Jurisdiction of another State, or of the United States.*

§ 507. The legislature of a State cannot authorize, by statute, the flowing of land of another person in

¹ See also *Speidensparger v. Spear*, 5 Shep. (Me.) R. 123.

² *Nelson v. Butterfield*, 8 Shep. (Me.) R. 220.

another State.¹ It was not denied, but on the contrary, it was admitted by the defendants in *Farnum v. Blackstone Canal Company*,² that the State of Rhode Island possessed no legislative authority to authorize the raising of any dam locally within that State, whereby the waters of the Blackstone river would be flowed back to the injury of property locally situated in Massachusetts, and the Court were thus spared the decision of the question.

§ 508. The territory belonging to the United States, and situated within the limits of any one State, and over which jurisdiction has been ceded to the United States, and which is used for exclusive and constitutional objects, are subject to the legislation of Congress, and not to that of the State. The Courts of Massachusetts cannot take cognizance of offences committed upon lands in the town of Springfield, in that State, which have been purchased by the United States for the purpose of erecting arsenals, to which the consent of the State has been granted;³ and it seems, that the statute laws of Massachusetts respecting the flowing of land were not intended to authorize the flowing back upon public lands of the United States.⁴ It is very certain that in a place over which jurisdiction has been ceded to the United States, the State laws cannot be permitted to embarrass the object of the cession; and, therefore, the statutes of Massachusetts authorizing the flowing of land, do not apply to the case of machinery used by the United

¹ See *Ante*, § 421.

² *Farnum v. Blackstone Canal Corporation*, 1 Sumn. (Cir. Co.) R. 46.

³ *Commonwealth v. Clary*, 8 Mass. R. 72.

⁴ *United States v. Ames*, 1 Woodb. & Min. (Cir. Co.) R. 76.

States at Springfield — that being a place over which jurisdiction has been ceded to them — so as to authorize a mill-owner to flow back in a way to impair in any degree the *use of the machinery*.¹ But where the United States own land situated within the limits of any State, and over which they have never had cession of jurisdiction, the rights and remedies in relation to it are usually such as apply to other land-owners within the State, and the *lex rei sitæ* will govern; except where the Constitution, treaties, or statutes of the United States, otherwise provide.²

11. *Of the Complaint under the Statute of Massachusetts and the Proceedings following it.*³

§ 509. A person in possession of the land under a deed, and claiming title, may maintain a complaint against a mill-owner for flowing, although such title be defeasible. The flowing is not a disseisin of the owner of the land; and, therefore, if such flowed land be conveyed by the owner, the grantee may complain against the mill-owner for damage.⁴

§ 510. In *Holmes v. Drew*,⁵ it was decided, that the respondent was not answerable for damage done before she became owner of the mill and dam. Yet the statute provides, that the complainant can recover damages for the next preceding three years. But that

¹ *United States v. Ames*, 1 Woodb. & Min. (Cir. Co.) R. 76.

² *Ibid.* The United States (without a cession of jurisdiction) have no other rights within the several States than as a land-owner, and when they grant a portion of their domain, only such rights as are incident to the land pass to the purchaser. *Hendricks v. Johnson*, 6 Port. (Ala.) R. 472.

³ See the Rev. Stat. in Appx. p. i.

⁴ *Charles v. Monson and Brimfield Manuf. Co.*, 17 Pick. (Mass.) R. 70.

⁵ *Holmes v. Drew*, 7 Pick. (Mass.) R. 141.

case puts this modification on the generality of the words, viz., provided the respondent, as such mill-owner, has caused such damage. So in the case above referred to of *Charles v. Monson and Brimfield Manufacturing Company*,¹ the correlative proposition was held, that an original complaint would lie against those who have ceased to be owners and occupants of a mill, for the damage which accrued whilst they were owners. This decision, which was upon the old statute, went on the ground, that by a reasonable construction, the terms "owner and occupant," as applied to the mill, must be intended those who were owners and occupied for the time being, and caused the damage. The case of *Walker v. Oxford Woollen Manufacturing Company*,² required the Court to go but a step further in the same direction. That was a case where the complainant had ceased to be the owner of the land flowed; and of course, if he could not have the process, under the statute, he was without remedy. It was accordingly held, that if an owner of land, which is flowed by a mill-dam, sells and conveys the land before he has proceeded against the mill-owner for damages, he may afterwards maintain a complaint, on the Revised Statutes, c. 116, and have the jury assess the damages caused by flowing the land while he owned it.

§ 511. After an owner of land flowed by a mill-dam has a verdict for annual damages allowed and recorded, he may maintain an action against the owner or occupant of the mill for the sum due and unpaid for the

¹ *Ub. sup.*

² *Walker v. Oxford Woollen Manuf. Co.*, 10 Me● (Mass.) R. 203.

three years next preceding the commencement of such action, although the mill and dam are destroyed ; provided the owner has not abandoned his privilege. And a mortgagee of a mill and privilege, who has taken and kept possession for condition broken, is liable to be proceeded against under the Revised Statutes, (c. 116, § 24,) for the unpaid annual damages for flowing land, which have been awarded by verdict against the mortgagee.¹

§ 512. In a complaint for flowing the land of the complainant, a general description of the land is sufficient, and such a description as is sufficient for the purpose of directing the view of the jury is all that is required.² If the complaint (under St. 1795) does not state, that the water was raised by the defendant for the purpose of carrying a water-mill, it is a defect in substance ; though it may be cured by a plea in which the respondent avers, that he was owner of a mill on and below the dam, and as such owner, has a right to raise the water by means of the dam.³

§ 513. As to the assessment of damages by the jury, it has been held (in conformity to the doctrine laid down in the preceding chapter)⁴ that, in determining whether any damage be done to the land, any benefit to be derived from the flowing may be taken into view.⁵ In *Avery v. Van Deusen*,⁶ the Court considered, that the right of the jury to estimate the benefit

¹ *Fuller v. French*, 10 Met. (Mass.) R. 359.

² *Commonwealth v. Ellis*, 11 Mass. R. 462.

³ *Slack v. Lyon*, 9 Pick. (Mass.) R. 62.

⁴ See Ante, § 473, 474.

⁵ *Palmer v. Ferrill*, 17 Pick. (Mass.) R. 58.

⁶ *Avery v. Van Deusen*, 5 Pick. (Mass.) R. 182.

derived from the overflowing, necessarily resulted from the issue they were to try — the general question of damage being before the jury.

§ 514. On a complaint for flowing a meadow, and thereby rendering it less productive, evidence on the part of the defendant that other meadows on the same stream had also become less valuable, is inadmissible, unless accompanied with proof that such meadows were similar to the plaintiff's meadow.¹ Where by the erection of a mill-dam, a tract of meadow, wood and arable land, belonging to the complainant, was overflowed and injured, evidence of damage done to his upland adjoining the meadow is admissible ;² and if, on a complaint to recover damages for overflowing the complainant's land, he would claim consequential damages to other land belonging to him, he must set forth such claim in his complaint.³

§ 515. A verdict and judgment in a process for the assessment of damages, finding that the complainant has sustained no damages, is no bar to another complaint for subsequent damages. Nor is a recovery at Common Law for damage occasioned by the erection of a mill-dam, a bar to process under the statute for damage by the continuance of it.⁴ Where the respondent does not plead, the sheriff's jury are bound to give some damages, and upon their failure to do so, the proceedings and judgment thereon will be quashed.⁵

¹ *Standish v. Washburn*, 21 Pick. (Mass.) R. 237.

² *Monson and Brimfield Manuf. Co. v. Fuller*, 15 Pick. (Mass.) R. 554 ; *Palmer v. Ferrill*, *ub. sup.*

³ *Ibid.*

⁴ *Staples v. Spring*, 10 Mass. R. 72.

⁵ *Van Deusen v. Comstock*, 3 Mass. R. 184.

§ 516. By the statute of Massachusetts of 1829, the land-owner was permitted to have not only his annual damages assessed, and be entitled from time to time to recover the same, but he acquired the farther right to have gross damages also assessed, for a perpetual servitude, or permanent flowing of his lands, with the right of election to take either yearly or gross damages; and the Revised Statutes have substantially reenacted the same provisions.¹

§ 517. The Revised Statutes make no provision for a re-assessment of gross or annual damages assessed against a mill-owner for flowing, after the mill-owner has elected to take the gross damages. A mill-owner can only maintain a complaint for re-assessment of annual damages caused by his flowing, when he stands liable for such damages under an existing judgment; and, therefore, cannot maintain such complaint, when the land-owner has elected the gross damages.²

§ 518. Referees, to whom a complaint for flowing was submitted, under a rule of Court, assessed all past damages done to the complainant by such flowing, up to the time when they returned their award into Court, and also assessed future yearly damages, and a sum in gross, for all damages thereafter to be sustained. The award was immediately accepted, and judgment rendered thereon; and the complainant seasonably elected to take the sum in gross. The respondent, as soon as the award was published, filed a notice, and gave a copy thereof to the complainant, that he waived all right to flow the land in question, and that he should

¹ See Revised Statutes, in Appx. p. iv. sect. 19.

² *Stevens v. Fitch*, 2 Met. (Mass.) R. 507; *Snell v. Bridgewater Cotton Gin Manuf. Co.* 24 Pick. (Mass.) R. 296.

not thereafter flow the same, but should draw down the water raised by his mill-dam ; and he immediately drew down the water accordingly. He besides paid to the complainant all past damages, as assessed by the referees, and the cost of the proceedings on the complaint, pursuant to the judgment on the award. In an action by the complainant to recover gross damages, it was held, that the respondent was not bound to pay them.¹ The subject was somewhat considered in *Fowler v. Holbrook*,² and it was there suggested, in the opinion of the Court, that there might be a right of election, on the part of the owner of the dam, to waive his right to flow the land of another, and that, by so doing, he might exonerate himself from the payment of gross damages. It was said, however, if he had such right, it was requisite he should remove the obstruction, and so restore the land to the other party as it was before it was flowed ; and that he should give reasonable notice of his election to abate the obstruction, rather than pay the estimated damages. This he had not done ; on the contrary, he had kept up a head of water to the extent and in the manner authorized by the verdict of the jury that assessed the gross damages. But the circumstances of this case are dissimilar to those of the preceding case. There the mill-owner, immediately on the publication of the award assessing the gross damages, being dissatisfied therewith, drew down the water of his pond, and had not since overflowed the land of the plaintiff ; and he also immediately gave notice of his abandonment of all claim of right to flow the land.

§ 519. Where the owner of land which was flowed

¹ *Hunt v. Whitney*, 4 Met. (Mass.) R. 603.

² *Fowler v. Holbrook*, 17 Pick. (Mass.) R. 191.

by means of a mill-dam, obtained a judgment on a verdict of a sheriff's jury, that assessed his annual damages, and afterwards he filed a complaint against the mill-owner, alleging that the dam and the water had been raised higher than was allowed by the former verdict, and praying for a new assessment of his annual, and also gross, damages, upon which a sheriff's jury were impannelled, who decided that the dam had not been raised higher than was allowed by the former verdict, but they assessed annual damages to a greater sum than was assessed by the former verdict, and also assessed gross damages;—this verdict could not be sustained, because the complainant had not alleged that he was dissatisfied with the annual compensation established by the first jury.¹

§ 520. By the Revised Statutes, the question whether a complainant has sustained damage from the flowing of his land by a mill-dam, cannot be tried by a jury at the bar of the Court, but is open to the sheriff's jury who view the land.²

§ 521. Where it is adjudged that the respondent has no right to flow the land without the payment of damages, and that he pay a certain sum as the yearly damage, he is thereby estopped to plead, in bar to a complaint for an increase of such sum, a right by prescription, or by a grant previous to the judgment, to flow the land without payment of damages. And so is he likewise estopped to plead in bar, that no damage is done to the land; for that question must be determined by the jury.³

¹ *Leonard v. Schenck*, 3 Met. (Mass.) R. 357; *Stevens v. Fitch*, 2 Met. (Mass.) R. 508.

² *Charles v. Porter*, 10 Met. (Mass.) R. 87; *Van Deusen v. Comstock*, 8 Mass. R. 187.

³ *Adams v. Pearson*, 7 Pick. (Mass.) R. 841.

§ 522. All matters which may be pleaded in bar of a complaint for flowing land, are conclusively settled against the respondent, by a verdict found in favor of the complainant, on an issue tried at the bar of the Court; and the respondent cannot give any of those matters in evidence to a sheriff's jury, impanelled to appraise the damage sustained by the complainant.¹ If the complainant obtains judgment on a verdict of the sheriff's jury, he is entitled to the costs of former trials in which the verdicts returned for him are set aside for irregularity.²

§ 523. The verdict of the jury who make an appraisement of the yearly damages done to the land, under the Stat. 1795, returned, allowed, and recorded, is to be the measure of the yearly damages, until one party or the other shall, by a like process, obtain an increase or diminution thereof. It has the effect of a composition by deed; and an action of debt may be brought on the record; but no execution issues, and no *scire facias* lies for the future damages. The owner of the land may require security for the payment of such damages from time to time; if the mill-owner neglects or refuses to give such reasonable security as the Court shall offer, he is to have no benefit of the act. The composition thus established *runs with the land*, so that it binds not only parties to the record and privies, but their grantees.³

§ 524. A *certiorari*, and not a writ of error, lies to the Court of Common Pleas for a revision of their proceedings by the Supreme Court; on which the latter

¹ Charles v. Porter, 10 Met. (Mass.) R. 37.

² Fitch v. Stevens, 2 Met. (Mass.) R. 506.

³ Commonwealth v. Ellis, 11 Mass. R. 465.

Court can only affirm the proceedings, if found to be irregular, or quash them, if the Court below has exceeded its jurisdiction, or proceeded in a manner not warranted by the statute, or other authority on which it acts.¹

§ 525. Where proceedings against a party, under the Revised Statutes, on a complaint for flowing, are not authorized by the provisions of c. 116, and judgment for damages is recovered against him, a writ of *certiorari* will be granted to remove the proceedings, for the purpose of quashing them, although he might have prevented such judgment by a proper defence to the complaint. A writ of *certiorari* was awarded where A, whose land was flowed by a dam erected by B, instituted a complaint, and recovered damages against B, and it was not alleged in the complaint, nor true in fact, that B had erected a mill, or had an intention forthwith to erect one, in connection with his dam.²

12. *Of the Complaint under the Statute of Maine, and the Proceedings following it.*³

§ 526. Under the laws of Maine — authorizing the flowing of land by mill-owners not belonging to them — where the owner of land flowed by a mill-dam *sells the mills and dam*, and retains the land, the right to flow the land, to the extent to which it was then flowed, without payment of damages, passes by the grant. But where the owner *sells the land flowed*, and retains

¹ Ibid; *Palmer Co. v. Ferrill*, 17 Pick. (Mass.) R. 58.

² *Barnard v. Fitch*, 7 Met. (Mass.) R. 605.

³ See the Rev. Stat. in App'x, p. ix.

the mills and dam, without reserving the right to flow, he is not protected from the payment of damages.¹ It is no defence that the ownership of the land flowed ceased, before instituting the complaint.²

§ 527. One who is neither the owner or the occupant of a water-mill, for the use of which the water has been raised or continued, nor the owner or occupier of the mill-dam, is not liable to the owner of the land flowed, although he may be benefited by the flow of the water. Thus, if a blacksmith's shop, in which the bellows is worked by a water-fall, can be considered a mill, yet if there is only a right to use the water for that purpose at the will of the owner or occupant of the dam, and at such times and under such restrictions as he may please to prescribe, the owner of such shop is not liable to the payment of damages for the flowing of the water.³

§ 528. Where the proprietor of land overflowed by a dam owned by different persons, proceeded by separate complaints, and recovered judgment for yearly damages against each owner of the dam for flowing different portions of the complainant's land; and where, afterwards, one of the respondents becomes sole owner of the dam; if the proprietor of the land seek an increase of his yearly damages, he may combine the whole subject-matter in one complaint against the then owner of the whole dam.⁴

§ 528 *a*. All the owners of mill-dams complained of should be joined in a complaint under the provisions

¹ *Preble v. Reed*, 5 Shep. (Me.) R. 169; and see *Hathorne v. Stinson*, 1 Fairf. (Me.) R. 224.

² *Bean v. Hinman*, 3 Red. (Me.) R. 480.

³ *Nelson v. Butterfield*, 8 Shep. (Me.) R. 220.

⁴ *Jones v. Pierce*, 4 Shep. (Me.) R. 411.

of the Maine Rev. St. c. 126; and if they be not all joined, the complaint will be dismissed, if the nonjoinder be pleaded in abatement.¹

§ 529. The owner of the dam at the time when the yearly damage by flowing becomes due, is liable to pay it for the whole of that year; and the mortgagee in possession, for this purpose, must be regarded as owner.²

§ 530. In proceedings under the statute, the respondent must plead any matter showing sufficient cause why further proceedings should not be had against him, though such plea be not among those enumerated; and if such matter pleaded be in its nature preliminary to the appraisement of damage by the commissioners, it will be tried at the bar of the Court, previously to the issuing of the warrant. In such case, if the plea involves matter triable by jury, with other matter cognizable only by the commissioners, the finding as to the latter part will be rejected as surplusage.³

§ 531. In a complaint by the owner of the land, under the statute of Maine, to recover damages occasioned by its being flowed by a mill-dam, the question whether the plaintiff has *suffered any damages*, is to be determined only when the *amount* of damages is under consideration.⁴

§ 532. One J. T. and other individuals named only as such, gave a bond to one R. G., submitting to arbitrators "his claim for damages occasioned to his land

¹ Hill v. Baker, 15 Shep. R. 9.

² Lowell v. Shaw, 3 Shep. (Me.) R. 242.

³ Axtell v. Coombs, 4 Greenl. (Me.) R. 322.

⁴ Nelson v. Butterfield, 8 Shepl. (Me.) R. 220.

by the erection and continuance of the dam across Saco River at Union Falls." The arbitrators, reciting that they had *viewed the premises*, awarded that J. T. "*and other proprietors of the Union Falls Mills*" should pay to R. G. a certain sum, and costs. It was held, that here were sufficient indications that the award was between the parties to the bond; that the award was of itself a bar to any farther claim for damages, and operated to secure to the obligors the right to flow the land in future, without payment of damages to the obligee; and that, therefore, it was mutual and final.¹

§ 533. A special act of the legislature, relieving mill-owners from a statute obligation to keep a passage open for fish, four months in the year, will not affect their liability to the owners of land, for the increased injury to them by flowing.²

§ 534. By the statutes of flowing of Massachusetts, as they existed in Maine before it was separated from Massachusetts, whether a complainant had been injured or not, was a proper subject for the consideration of the jury. But it is held to be beyond doubt the intention of the legislature of Maine, to require that defence to be first made before the commissioners whose report may be impeached, and this question among others may be regularly presented to a jury for decision. The difference between the statutes before the revision in 1821, and since, is noticed in the case of *Cowell v. The Great Falls Manufacturing Company*,³ by WESTON, J., who says,—“It has been contended

¹ *Gordon v. Tucker*, 6 Greenl. (Me.) R. 247.

² *Hathorne v. Stinson*, 3 Fairf. (Me.) R. 183.

³ *Cowell v. Great Falls Manuf. Co.*, 6 Greenl. (Me.) R. 285.

by the counsel for the party claiming an appeal in this case, that the second section of the act of Massachusetts, stat. 1797, ch. 63, and the third section of our statute, for the support and regulation of mills, are substantially the same. Upon comparing them, however, a manifest difference will be found to exist. In the Massachusetts statute it is provided, that if any owner or occupant of any mill shall plead to such complaint, and in his plea shall dispute the statement made by the complainant, or shall deny the complainant's title to the lands, said to be damaged by flowing, &c., after the trial of an issue joined thereon in the Common Pleas, an appeal is given to the Supreme Judicial Court. In the corresponding section in the revised statutes of Maine, the words, 'and in his plea shall dispute the statement made by the complainant,' are omitted." By the additional act of Massachusetts passed on the 28th of February, 1798, the complainant was required to state that "he sustains damages in his lands by their being flowed in the manner mentioned in said act." And the owner or occupant of the water-mill might, among other matters of defence, "dispute the statement made by the complainant;" and the act of that State passed on the 27th of February, 1796, did not authorize the jury which assessed the damages, to decide, that the complainant had not suffered any damages. On a revision of these statutes in Maine, in the year 1821, the words "dispute the statement made by the complainant," were omitted in the statement of the defences, which might be made before a jury on the first trial in Court. And there was a provision inserted, "that if said jury (alluding to the jury authorized to view the land and assess the damages) shall find and so return in their verdict

that no damage is done to the complainant by flowing his land as aforesaid, the respondent shall recover his costs." The additional act passed in Maine on the 14th day of February, 1824, c. 261, also provided, that the commissioners appointed to view the land and assess the damages, should determine, whether the complainant had suffered damage, subject to a revision before a jury. The statutes of Massachusetts did authorize the jury in the first instance to determine, whether the complainant had suffered damage; but the statutes in Maine have taken from such a jury that power, and transferred it to the jury or commissioners authorized to assess the damages. Testimony, therefore, tending to prove that the complainant had not suffered damage, must be excluded from the consideration of this jury. The question, whether the complainant has suffered any damages, is to be determined only when the amount of damage is also under consideration.¹

¹ See opinion of Shepley, J., in *Nelson v. Butterfield*, 8 Shepl. (Me.) R. 220. In *Cowell, &c. ub. sup.*, it was held, that in a complaint for flowing land under the statute of Maine of 1821, no appeal lies from the judgment of the Court below, unless the respondent, in his plea, either denies the title to the complainant to the lands flowed, or claims the right to flow them without the payment of damages, or for an agreed composition.

CHAPTER XIII.

OF SUCH WATERCOURSES AS ARE SUBJECT TO PUBLIC USE.

1. When a Watercourse is a Public Highway.
2. The Common-Law Distinction between Rivers boatable and navigable, and how far the distinction has been recognized in this Country.
3. Public Right to the Banks of Public Rivers.
4. Obstructions to the Navigation of Public Rivers.
5. Remedies in Cases of Obstruction to Navigation.

1. When a Watercourse is a Public Highway.

§ 535. It was mentioned in the beginning of the work, that a watercourse, as subservient to the rules of law, in respect to the right to its use, is to be regarded in two points of view; first, where it is altogether private, as in the case of shallow streams; and secondly, where it is both private and public, that is, where the private property therein is subject to public use.¹ All rivers above the flow of tide-water are, by the Common Law, *prima facie* private; but when they are naturally of sufficient depth for valuable *flotage*, the public have an *easement* therein for the purposes of transportation and commercial intercourse; and, in fact, they are *public highways* by water. Such is the Common Law, as laid down in the excellent treatise of Sir Matthew Hale,² which in England has ever commanded profound respect. It certainly has the merit of defining, with much precision, what constitutes a public highway by

¹ See Ante, § 1 - 5.

² Harg. Tracts, De Jure Maris, &c.

water, and of illustrating, with an equal degree of perspicuity, the distinction between such rivers as are exclusively private, and those in which the community may assert an interest. *Fresh* rivers, of what kind soever, says he, do of common right, belong to the owners of the adjacent soil; but that such rivers, as well as those which ebb and flow, may be under the servitude of the public interest; that is to say, they may be of public use for the carriage of boats. As instances, he mentions the Wye, the Severn, and the Thames, which he says are public rivers, *juris publici*, as well above as below the flowing of the tide, and as well in the parts where they are of private as of public (as in the case of tide rivers) property; and nuisances and impediments therein are liable to be punished by indictment. They are called public rivers, not in reference to the *property* of the river, for that is in the individuals who own the land,¹ but in reference only to the public use.²

§ 535 *a*. In *Munson v. Hungerford* it was held by the Supreme Court of the State of New York, that a stream, in which the tide does not ebb and flow, and which is not navigable for boats or vessels or rafts, and has not been declared a public highway by statute, is not a *navigable* stream, within the meaning of the authorities, so as to subject it to the use of the public, but is altogether private property.³

¹ See Chap. I.

² Royal Fishery in the River Banne, *Davies*, R. 152; *Carter v. Murcot*, 4 Burr. R. 2162; *Callis on Sewers*, 78.

³ *Munson v. Hungerford*, 6 Barb. (N. Y.) Sup. Co. R. 265. It is not enough that a stream is capable, (during a period in the aggregate of from two to four weeks in the year, when it is swollen by the spring and autumn

§ 536. It is of great importance, that the law upon this subject in this country should be well understood and well settled, as the territory of the United States is distinguished, particularly for such rivers as come within the above description of public highways by water; and to them has the public at large been extensively indebted for the easy and convenient communication by them afforded, between the maritime cities and the rapidly growing and productive regions of the interior. They have imparted energy to the enterprising genius of the people, and been the means of transforming deserts and forests into cultivated and fruitful fields, flourishing settlements, and opulent cities. That portion of the river Connecticut, which is as high up from tide water as the State of New Hampshire — it there affording *flotage* — is, by the Common Law, a public highway.¹ The Potomac is part of the *jus publicum*, and any obstruction to its navigation would, upon the most established principles, be a public nuisance.² This river, above tide water, was not originally navigable; but it has been made so, in a qualified manner, by law in Maryland, to which State it entirely belongs.³ The river Mississippi is præeminently an open highway, and upon principles of international law, the right of passage in it, by a citizen of one State, within the jurisdiction of another, is classed among imperfect rights;

freshets,) of carrying down its rapid course whatever may have been thrown upon its angry waters to be borne at random over every impediment. *Ib.*

¹ *Scott v. Wilson*, 3 N. Hamp. R. 321; and see *Moffett v. Brewer*, 1 Greene, (Iowa,) R. 348; *Moore v. Veazie*, 2 Red. (Me.) R. 343.

² *Georgetown v. Alexandria Canal Co*, 12 Peters, (U. S.) R. 91.

³ *Binney's Case*, 2 Bland, (Md.) Ch. R. 99.

but the right was made perfect by the Constitution of the United States, which provides that the citizens of each State shall be entitled to the privileges of the several States.¹ Under the ordinance of 1787, stipulating that "the navigable waters leading into the Mississippi and St. Lawrence, shall be common highways, and forever free," he who owns the lands on both banks, owns the entire river, subject only to the easement of pavigation; and he who owns the land upon one bank only, owns to the middle of the river, subject to the same easement.² The river Muskingum is a common highway under the ordinance above mentioned, and the legislature cannot authorize a dam to be built across which obstructs its navigation.³

§ 537. If a stream is naturally of sufficient size to float boats or *mill-logs*, the public have a right to its free use for those *two* purposes, unincumbered with dams, &c.⁴ In *Varick v. Smith*, in New York,⁵ the Vice-Chancellor held, that the doctrine that fresh-water rivers, above tide-water, belong to the owners of the soil adjacent, though capable of being used for the purposes of navigation, had been sanctioned and confirmed by repeated decisions in that State, and applied to streams which were navigable for boats and *rafts*, which had been declared to be public highways by statute. In *Scott v. Wilson*, in New Hampshire,⁶ it

¹ Per Catron, C. J., in *Corporation of Memphis v. Overton*, 3 Yerg. (Tenn.) R. 389.

² *Gavit v. Chambers*, 3 Ohio R. 495; *Cowper v. Hall*, 5 Ohio R. 320.

³ *Hogg v. Zanesville Canal Co.*, 5 Ohio R. 410.

⁴ *Wadsworth v. Smith*, 2 Fairf. (Me.) R. 278.

⁵ *Varick v. Smith*, 9 Paige, (N. Y.) Ch. R. 547.

⁶ *Scott v. Wilson*, 3 N. Hamp. R. 321. When timber is forfeited under the act regulating the mode of putting pine timber into the Connecticut

was held, that the river Connecticut, above the ebb and flow of the tide, had been so long used for the purposes of boating and *rafting*, that it must be considered a highway.

§ 538. The public likewise have a right to travel on a public river upon the *ice*; and, therefore, if any one cuts holes through the ice upon or near the place where there has been a *winter way* for twenty years, he is liable to the payment of all damages sustained thereby by those travelling upon such way, without carelessness or fault on their part. The waters of the river Penobscot are, of common right, a public highway, and though the right so to use it by all the citizens, is generally exercised when its waters are in a fluid state, yet when they are congealed, the citizens have still a right to traverse their surface at pleasure. Assuming that the riparian owners have as good a right to the use of the water as the public generally have to the right of passage, the use of the privilege should be such, as may be most beneficial and least injurious to all who have occasion to avail themselves of it.¹

§ 539. A riparian proprietor does not, in England, make his watercourse a public one, or one subject to public use, by making it at his own expense boatable by artificial means, as by locks, or by uniting other waters, unless the improvement be made by public

river, the title of the former owner is wholly lost, and a contract with the person who has taken it up, to pay him for his trouble and take it away, does not revest the title until the contract is executed. *Ib.* Pine timber put into the Connecticut river, and which may have been liable to forfeiture, cannot be seized as forfeited, after the owner has regained the possession of it, and has it in his custody. *Barron v. Davis*, 4 N. Hamp. R. 338.

¹ *French v. Camp*, 6 Shepl. (Me.) R. 438.

authority, or for a long continuance of time it has been used by the public.¹ In this country, likewise, such little streams as are not boatable, that is, as cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are wholly and absolutely private; not subject to the public interest, nor to be regarded as public highways by water.² If a person be the owner on both sides of such a watercourse, and at his own expense makes it boatable by artificial means, it does not thereby become public; it is still private property, and cannot be infringed, even by the legislature, without a satisfaction being made.³

§ 540. But should a person obstruct the flow of the waters of a stream over their accustomed bed, so that it could not be used as formerly for the purpose of boating or floating rafts or logs, and should turn them into a new channel, he would thereby authorize the public to make use of them in the new channel, as they had been accustomed to use them in their former channel. But on the same principle that a riparian owner may improve his watercourse, by locks or otherwise, he may make a new watercourse upon his own land, and withhold its use from all who will not make compensation, and authorize its use by those who will. Nevertheless, those who have been injured by the opening of such new watercourse, may abate it as a

¹ Harg. Tracts, Hale's Treatise, De Jure Maris, &c. In England a person, by license from the crown, may make locks upon a public river flowing through his land for the advantage of the navigation; and the owners of barges passing through the same, are under obligation to pay such tolls as the Privy Council shall appoint. Cro. Car. 132; Cowp. R. 47.

² *Cates v. Wadlington*, 1 McCord, (S. C.) R. 580.

³ *Wadsworth v. Smith*, 2 Fairf. (Me.) R. 278.

nuisance, or recover damages for the injury in an action at law.¹

§ 541. The legislature of a State cannot, by declaring a river navigable, which is not so in fact, deprive the riparian owners of their rights to the use of the water for hydraulic and other purposes, without rendering them compensation;² and the provisions of the legislative resolutions of Ohio, providing for the assessment of damages to the riparian owners upon navigable streams, are construed to extend to all streams, which have been by the legislature declared navigable.³ Indeed, as has been shown by the law of *eminent* domain,⁴ a State has not the right, without making compensation, to destroy the property of individuals situated upon a watercourse, in making it navigable, when it is not so by nature; or in appropriating such watercourse to the public use, by artificial erections and improvements.⁵ A company incorporated for the purposes of lock navigation, cannot claim the privileges of a riparian owner; and, therefore, it has no right to swell the water beyond what it derives from the act of incorporation; and being by this required to make compensation "for any damage done to lands or property," must do so under all circumstances, when its works are the cause of the injury; and is answerable for injury even in times of flood, from the swelling back of the water by its dam, upon its

¹ *Divinel v. Barnard*, Sup. Jud. Co. of Maine, Penobscot County, June Term, 1849, reported in *Law Rep.* for November, 1849, p. 339.

² *Walker v. Board of Public Works*, 16 Ohio R. 540; *Moore v. Veazie*, 2 Red. (Me.) R. 343.

³ *Walker, &c., ub. sup.* See *State v. Callum*, 2 Speers, (S. C.) R. 581.

⁴ *Ante*, Chap. XI.

⁵ See the opinion of Chancellor Bland, in *Binney's case*, 2 Bland, (Md.) Ch. R. 158.

neighbors.¹ A stream in Pennsylvania, which has been declared by the legislature to be a public highway, is a "navigable" stream in the sense in which all boatable rivers are viewed by the Courts of that State;² but such declaration will not divest property previously acquired to the middle of the stream by a grant from the State.³ At the same time an act of a State legislature imposing reasonable tolls, as a compensation for *improving* the navigation of a *public* river, is constitutional and valid, unless it conflicts with the power of Congress in actual exercise.⁴

2. *The Common-Law Distinction between Rivers boatable and "navigable," and how far the Distinction has been recognized in this country.*

§ 542. It has appeared, that the line of demarcation of the Common Law between such streams of water as are private, and such as are altogether public, is that at which they begin to partake of the sea. Below this point the water is not only public for all floatable uses, but the *bed* or *soil* over which the water runs is also public; both the use and the property, in other words, are public. The River Hudson, for example, is entirely private property, in one part; is subject as such to public use in another part; and is wholly and entirely

¹ *Monongahela Nav. Co. v. Coons*, 6 Barr. (Penn.) R. 379.

² See Post, Pt. II. of this chapter.

³ *Covert v. O'Connor*, 8 Watts, (Penn.) R. 447. And see *Monongahela Nav. Co. v. Coons*, 6 Watts & S. (Penn.) R. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. (Penn.) R. 9.

⁴ *Thames Bank v. Lovell*, 18 Conn. R. 566. And see *Spring v. Russell*, 7 Greenl. (Me.) R. 273; *Shrunk v. Schuylkill Nav. Co.*, 14 S. and Rawle, (Penn.) R. 71; *Hart v. Hill*, 1 Whart. (Penn.) R. 136.

public property from its mouth to as high up therefrom as the tide flows. In that part of the stream wherein the entire right of property is in the public, it is called by the law "navigable," which in the technical sense, and different from the common acceptation of that word, is confined in its application to fresh rivers only to the extent to which they are propelled backward by the ingress and pressure of the ocean tides.

✓ § 543. To determine whether a river is "navigable" in the Admiralty acceptation of that term, regard must be had to the ebbing and flowing of the tide.¹ In the Supreme Court of the United States, in a case which came up from the District Court of the eastern district of Louisiana, the question was presented of admiralty jurisdiction, in the river Mississippi, which the Court considered was to be determined by the ebbing and flowing of the tide; and in determining the question, the ordinary state of the water, uninfluenced by any extraordinary freshets, was to be regarded.²

§ 544. It was urged in *Rex v. Smith*,³ that the river Thames, above London bridge, was not "navigable," although it was flowing and reflowing, inasmuch as the tide beyond that limit was occasioned by the pressure and accumulation backward of fresh water. But the distinction attempted was, by Lord Mansfield, pronounced new and inadmissible. In a case, in the British House of Lords, where the question was, what was to be considered "river" and what "sea;" and where the direction was, that the thing to be looked to is the fact of the absence or prevalence of the fresh water,

¹ Sir Henry Constable's case, 5 Ca. R. 107.

² *Peyroux v. Howard*, 7 Peters, (U. S.) R. 324.

³ *Rex v. Smith*, 2 Doug. R. 441.

though strongly impregnated with salt; the direction was held to be erroneous.¹ The Supreme Court of the United States referring to the above case of *Rex v. Smith*, have decided, that although the current in the river Mississippi, at New Orleans, may be so strong as not to be turned backwards by the tide; yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it might properly be said to be within the ebb and flow of the tide.²

§ 545. The distinction as it regards the law of *meum* and *tuum* between the term “navigable” in its technical sense, when applied to a river, and in the common acceptation of it, when so applied, is important. In the case of the Royal Fishery of the river Banne, in Ireland, it was resolved, “that there are two kinds of rivers, navigable and not navigable; that every navigable river so high as the sea ebbs and flows in it, is a royal river, and belongs to the king, by virtue of his prerogative; but in *every other* river, and in the fishery of such other river, the *ter-tenants* on each side have an interest of common right; the reason for which is, that so high as the sea ebbs and flows, it participates of the nature of the sea, and is said to be a branch of the sea so far as it flows.”³ But all rivers entirely above the influence of the tide, if they are so large as to admit of navigation, and to be of public use for the passage of vessels, boats, &c., may, as well as those which ebb and flow, be under the servitude of the public interest, and be used as “public highways” by water. They are regarded as public, not in reference to the *property* in

¹ *Horne v. Mackenzie*, 6 Clark & Fin. R. 628.

² *Peroux v. Howard*, 7 Peters, (U. S.) 324.

³ Royal Fishery, in the river Banne, (case of) *Davies*, R. 149.

the soil or bed of the river, for that is in the riparian proprietors; but only in reference to public use. The doctrine of the Common Law as to this distinction, we have seen, is clearly and explicitly laid down by Lord Hale.¹ The right of property in the soil and bed of "navigable" rivers being thus vested in the sovereign, and that in the soil and bed of rivers which are only "public highways," being in the riparian proprietors, in adjusting controversies arising between the public and individuals, as to the right of soil covered by water, and the consequent rights of fishery, it may be necessary to ascertain the extent of the flowing of the tide.

§ 546. But the Courts of some of the States in this country have adjudged, that the Common Law, so far as it recognizes the above distinction, does not apply to our large fresh-water rivers, and that these rivers, without reference to the flow and ebb of the tide, do not belong to the owners of the land adjacent, and that they have not the property in the soil under the water, and the consequent exclusive right of fishing *usque ad filum aquæ*, or to the middle of the river; or, in other words, these rivers are to be deemed not merely "highways" but "navigable." Learned judges in New York have been inclined, on some occasions, to doubt the propriety of applying the rule of the Common Law to the extensive boatable rivers of this country, which are capable of being used as public highways far above where they are affected by tidal influence. Still, however, the rule remains unaltered in that State.² The

¹ De Jure Maris, &c., and see ante, § 535.

² See Palmer v. Mulligan, 3 Caines, (N. Y.) R. 307; Shaw v. Crawford, 10 Johns. (N. Y.) R. 236; People v. Platt, 17 Ib. 15; Hooker v.

question was directly passed upon in the Court of Chancery of New York, in *Varick v. Smith*,¹ whether the complainant, in the character of riparian proprietor, was to be regarded as the owner of the bed of the river Oswego, to the middle of the stream, adjacent to his possessions described in the bill; and WILLIAMS, V. C., considered it as settled in that State, that grants of land bounded on rivers above tide-water extend *usque ad filum aquæ*, and if the stream is in point of fact navigable for boats or other craft, the public have the easement of a right of passage, and nothing more. Upon an appeal of this case, in 1842,² it was, however, contended, that the decision of the Court of Errors, in the case of *Canal Appraisers v. The People*, on the relation of Tibbetts,³ and certain remarks of the Chancellor himself, made in the course of his opinion in that case, and some few facts given in evidence by the defendants, threw a doubt upon the point. V. C. GRIDLEY, in delivering his opinion upon making the decree appealed from, said it was true, that the counsel in the case just mentioned, contended that the Common-Law doctrine was not at all applicable in New York; but, said he, "it would seem to be enough that the most strenuous advocates for the right of the State to the bed of navigable rivers — Senators BEARDSLEY and TRACY — with this very evidence before them, took the

Cummings, 20 Ib. 90; Jennings, *ex parte*, 6 Cow. (N. Y.) R. 518; Canal Commissioners v. The People, 5 Wend. (N. Y.) R. 423; People v. Canal Appraisers, 18 Ib. 355.

¹ *Varick v. Smith*, 5 Paige, (N. Y.) Ch. R. 137.

² 9 Paige, Ch. R. 547.

³ *Canal Appraisers v. The People ex rel. Tibbetts*, 17 Wend. (N. Y.) R. 574, (in 1836.)

precaution to repel, by unequivocal language, the application of the principle contended for in the case before cited, to any other river than that of the Mohawk ; and expressly reserving their judgments as to all other cases." An opinion seems to have been entertained, that the various *acts of the legislature* in relation to the river Mohawk, were evidence, that the State was the owner of the bed of that river. But all of doubt or uncertainty upon the subject in New York, if any remained, were removed by the decision in the Court of Errors in that State in the case of the Commissioners of the Canal Fund *v.* Kempshall,¹ in which the judgment of the Supreme Court, in favor of the riparian owners, was unanimously affirmed.

§ 547. This rule of the Common Law has also been recognized in the States of Massachusetts and New Hampshire, and has been applied by the Courts of both to the river Connecticut at a point far above that to which the water is propelled backwards by the ingress and force of water from the sea.² It has been recognized also as law in the States of Connecticut,³ Maine,⁴ Maryland,⁵ Virginia,⁶ Ohio,⁷ and Indiana.⁸ In Illinois

¹ Commissioners of Canal Fund *v.* Kempshall, 26 Wend. (N. Y.) R. 404.

² Commonwealth *v.* Chapin, 5 Pick. (Mass.) R. 190 ; Scott *v.* Wilson, 3 N. Hamp. R. 321 ; State *v.* Gilmanton, 9 Ib. 461 ; Gray *v.* Bartlett, 20 Pick. (Mass.) R. 186.

³ Adams *v.* Pease, 2 Conn. R. 48 ; Chapman *v.* Kimball, 9 Ib. 38 ; East Haven *v.* Hemingway, 7 Ib. 186 ; Middletown *v.* Page, 8 Ib. 231.

⁴ Berry *v.* Carle, 3 Greenl. (Me.) R. 269 ; Spring *v.* Russell, 7 Ib. 273 ; Spring *v.* Seavey, 8 Ib. 138 ; Wadsworth *v.* Smith, 2 Fairf. (Me.) R. 278.

⁵ Brown *v.* Kennedey, 5 H. & Johns. (Md.) R. 195.

⁶ Hays *v.* Bowman, 1 Rand. (Va.) R. 417 ; Mead *v.* Haynes, 3 Ib. 33.

⁷ Gavitt *v.* Chambers, 3 Ohio R. 495 ; Lamb *v.* Ricketts, 11 Ib. 311 ; Walker *v.* Board of Public Works, 16 Ib. 540.

⁸ Cox *v.* The State, 3 Blackf. (Ind.) R. 193.

it is held, that the portion of the river Mississippi upon which that State is bounded, is not a "navigable" stream at Common Law, and that, therefore, the riparian ownership extends to the middle of the stream.¹

§ 548. On the other hand, the doctrine of the Common Law on this subject has been held to be inapplicable in Pennsylvania to the great rivers of that State, which are boatable far above tide-water, or where they are technically "navigable." It was settled in *Carson v. Blazer*,² that such rivers are "navigable," although there is no flow and re-flow of the tide, and that they belong to the State in the same manner and to the same extent, as an arm of the sea; and that, therefore, the riparian owners have not an exclusive right to fish therein immediately in front of their lands, but the right of fishery in them is open to all. "The qualities," said Mr. J. YEATES, (in giving his opinion in this ably argued case,) "of *fresh* or *salt* water cannot, amongst us, determine whether a river shall be deemed navigable or not; neither can the flux or reflux of the tides ascertain its character. Pursuing such a rule would, in fact, in the first case, render the river Delaware an unnavigable stream throughout the confines of the State; and in the second, would confine its navigable quality to its several courses south from Trenton. To assert that in either instance the proprietors of lands on the margin of that river have the sole right of fishery to the middle of its bed, corresponding to their title in front of it, is, I presume, a doctrine which the warmest advocates for the right of exclusive fisheries

¹ *Middletown v. Pritchard*, 3 Scamm. (Ill.) R. 500.

² *Carson v. Blazer*, 2 Binn. (Penn.) R. 475.

would scarcely contend for." The decision in this case was recognized and established, with much deliberation, in *Shrunk v. The Schuylkill Navigation Company*,¹ in which TILGHMAN, C. J., in giving the judgment of the Court, said,—"Many of our rivers, such as the Mississippi, Ohio, Alleghany, and Susquehannah, are navigable, even in their natural state, by vessels of considerable burden, and whether if such rivers existed in England, the rule of the Common Law might not have been different, may certainly admit of a question."²

§ 549. Mr. J. McLEAN apprehended, that the Common-Law doctrine, as to the "navigableness" of streams, could have no application in this country, and that the fact of navigableness did, in no respect, depend on the flowing of the tide;³ and to that effect it has been held in South Carolina⁴ and Tennessee.⁵ In Alabama every stream of water suited to the ordinary purposes of navigation, whether it ebbs and flows or not, (where the government has not expressly granted any part of the bed thereof,) is not only a public highway, but the owners of land bounded upon it can assert no private right of soil to the bed of the river.⁶ It has been held by the Supreme Court of North Carolina, too, that what is a "navigable" river in that State does not depend upon the rule of the Common Law; but that waters which are sufficient in fact, to afford a common passage for people in vessels, are to be taken as "navi-

¹ *Shrunk v. Schuylkill Nav. Co.* 14 S. & Rawle, (Penn.) R. 71.

² See also *Union Canal Co. v. Landis*, 9 Watts, (Penn.) R. 228; *Covert v. O'Connor*, 8 Watts, (Penn.) R. 447.

³ *Bowman's Devisees v. Wathen*, 2 McLean, (Cir. Co.) R. 376.

⁴ *Cates v. Waddington*, 1 McCord, (S. C.) R. 580.

⁵ *Elder v. Burrus*, 6 Humph. (Tenn.) R. 358.

⁶ *Bullock v. Wilson*, 2 Port. (Ala.) R. 436.

gable.”¹ In commenting upon the inapplicability of the Common Law on the subject, one of the Judges, in one case, in that State, pronounced it entirely inapplicable, and remarked, that by the rule of the Common Law, Albemarle and Pimlico Sounds, which are inland seas, would not be deemed “navigable” waters, and would be the subject of private property ; it makes no difference whether there is, or ever was, any tide in Albemarle Sound.² There is much force in the following reasoning of Judge TURLEY, of Tennessee, upon this subject, in delivering the opinion of the Supreme Court of that State, — “All laws are, or ought to be, an adaptation of principles of action to the state and condition of a country, and to its moral and social position. There are many rules of action recognized in England as suitable, which it would be folly in the extreme, in countries differently located, to recognize as law ; and, in our opinion, this distinction between rivers “navigable” and not “navigable,” causing it to depend upon the ebbing and flowing of the tide, is one of them. The insular position of Great Britain, the short courses of her rivers, and the well-known fact that there are none of them navigable above tide-water but for very small craft, well warrants the distinction there drawn by the Common Law. But very different is the situation of the continental powers of Europe in this particular. Their streams are many of them large and long, and navigable to a great extent above tide-water ; and accordingly we find that the

¹ *Wilson v. Forbes*, 2 Dev. (N. C.) R. 30.

² *Collins v. Benbury*, 3 Ired. (N. C.) R. 277 ; and see *Ingraham v. Threadgill*, 3 Dev. (N. C.) R. 59.

civil law which regulates and governs those countries has adopted a very different rule.”¹

§ 550. As above stated, the foregoing decisions conform to the Civil Law, by which all rivers in which the flow of water is perennial belong wholly to the public, and the public right extends to the use of the banks as well as to fishing.² *Navigable* rivers, in the language of the Civil Law, are not merely rivers in which the tide flows and reflows, but rivers capable of being navigated, that is, navigable in the *common sense* of the term. In the words of the Digest, a navigable river is “*statio iturve navigio*.” In the code Napoleon, navigable rivers are spoken of as “*flottables*,” that is, rivers admitting floats.³

§ 550 *a*. A collision took place in the river Mississippi, near the bay of Goulah, and there was much doubt in *Waring v. Clarke*,⁴ whether the tide flowed so high, the evidence being conflicting; but the majority of the Court thought there was sufficient proof of tide there, and consequently it was not necessary to consider whether the admiralty power extended higher. But this case shows the unreasonableness of giving a construction to the constitution which would measure the jurisdiction of the admiralty by the tide. By an act of Congress passed the 26th of February, 1845,⁵ the admiralty jurisdiction is made to depend upon the

¹ *Elder v. Burrus*, 6 Humph. (Tenn.) R. 366.

² Dig. 43, 12, 13, 14; Inst. 212; 2 Domat, Civ. Law, 382, b. 1, t. 8, s. 1, 2.

³ Dig. 43, 12, 13, 14, 15; Zouch, El. Jur. Descriptio Juris et Indicū Maritimi, part 1, s. 5; Code Napoleon, b. 2, t. 2, c. 2, art. 556, 560 – 563; B. 2, t. 1, c. 3; Ord. Louis. 14, s. 3, art. 5.

⁴ *Waring v. Clarke*, 5 How. (U. S.) R. 441.

⁵ 5 Stat. at Large, 726.

navigable character of the water, and not upon the ebb and flow of the tide. This act extended the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same, and it has been held to be consistent with the Constitution of the United States. The ground upon which the act rests is not the power granted to Congress to regulate commerce, but the lakes and navigable waters connecting them were within the scope of admiralty and maritime jurisdiction as known and understood, in the United States, when the Constitution was adopted. The admiralty jurisdiction granted to the Federal Government by the Constitution is not limited to tide-waters, but extends to all the public navigable lakes and rivers where commerce is carried on between different States, or with a foreign nation.¹ Over the *commercial* waters of a State, Congress can exercise no commercial power, except as it regards an intercourse with other States of the Union, or foreign countries.²

3. *Public Right to the Banks of Public Rivers.*

§ 551. By the Civil Law, which prevails in the greatest part of Europe and in Louisiana, the privilege of *towing* on the banks of navigable rivers is embraced in the public right of navigation.³ In this respect it is at variance with the Common Law. Bracton, it is true, has adopted the doctrine of the civilians, and his passage — *Riparum etiam usus publicus gentium sicut ipsius*

¹ Case of the Propeller *Genesee Chief*, 12 How. (U. S.) R. 443.

² Per McLean, J., in the *Passenger Cases*, 7 How. (U. S.) R. 283.

³ Just. Inst. L. 2, tit. 1, s. 4; Coop. Just. Tit. De Usu et Proprietate Riparum. The Civil Code of Louisiana follows the Roman Civil Law.

fluminis — is plainly taken from Justinian ; and though the same doctrine is quoted by Callis in his work on Sewers, it is impeached by the otherwise unanimous current of authority. The little to be found in the books upon the subject, prior to the time of Lord Hale, he has collected, and, after commenting upon it, he very evidently concludes that no such right as the one in question existed, inasmuch as he says, that where private interests are involved, they shall not be infringed without satisfaction being made to the party injured.¹ The doctrine, therefore, of the Civil Law on this subject conflicts with the principle of the Common Law, and with one of the characteristics of the express written American Constitutional Law, that public convenience is to be viewed with a due regard to private property. The statute of 19 Hen. VII., c. 18, relative to the navigation of the river Severn, allows a towing path to the navigators upon making reasonable compensation for the inconvenience they may thereby receive ; and it thereby distinctly affords a negative to the idea of a Common-Law right without compensation. In a modern case, by an act of Parliament, authorizing certain persons to make a certain part of the river Avon navigable, and to set out and appoint towing paths, it was required that satisfaction should first be given to the owners of the land, and commissioners were appointed to settle by inquisition what satisfaction every person, having a particular estate or interest therein, should receive for his respective interest.² But the question was brought directly before the King's

¹ De Jure Maris et Portibus.

² Bath River Navigation Co. v. Willis, 2 Cases relating to Railways and Canals, 7.

Bench in *Ball v. Herbert*,¹ whether, at Common Law, the public have the right of towing on navigable rivers; and it was expressly decided, that they had not. Lord C. J. KENYON said, he remembered when the case of *Peirse v. Lord Fauconberg* was sent to that Court from the Court of Chancery; and it was then the current opinion in Westminster Hall, that the right of towing depended on *usage*, without which it could not exist. Some of the passages, he said, in Lord Hale, which seem to favor the Common-Law right, are rather applicable to banks of the sea, and to ports.²

§ 552. The Supreme Court of Illinois, and that of Tennessee, have however decided, agreeably to the Civil Law, that the right of navigators was not limited to the bare privilege of floating upon the river Mississippi, but included the right to land, and fasten to the shore, as the exigencies of the navigation may require; and that such was a burden upon the owner of the land, which he must bear as a part of the public easement.³ Such, doubtless, had become established usage in respect to the great river in question, and if so, the decision is in accordance with the opinion of the Court in *Ball v. Herbert*. It was observed by Lord C. J. KENYON, in that case, that “perhaps small evidence of usage before a jury would establish a right by custom, on the ground of public convenience.”

¹ *Ball v. Herbert*, 3 T. R. 253.

² See this case cited and approved by the Judges in *Blundell v Catterall*, 5 B. & Ald. R. 91.

³ *Middletown v. Pritchard*, 3 Scam. (Ill.) R. 520; *Godfrey v. Alton*, 12 Ill. R. 29; *Alton v. Illinois Transp. Co.* Ibid. 38; *Corp. of Memphis v. Overton*, 3 Yerg. (Tenn.) R. 390. That the right of the public to tow vessels and boats upon the banks of navigable rivers, may be acquired by usage, see *Kinlock v. Neville*, 6 Mees. & Welsb. (Eng. Exchr.) R. 794.

§ 553. In Mississippi, the banks of a river, which is a public highway, are private property, subject to the exclusive appropriation of the owner, and are not subject to the use of the public, although the river itself may be a public highway.¹ The banks of navigable rivers, in Missouri, are public highways, and, though owned by private individuals, fishermen and navigators are entitled to a *temporary* use of them in landing, fastening, and repairing their vessels, and exposing their sales or merchandise; yet this right has its reasonable qualifications and restrictions, and will not allow a navigator to land for an unreasonable length of time, and, under pretence of repairing, employ teams, &c., thereby unreasonably obstructing the owner's enjoyment of his property.²

4. *Obstructions to the Navigation of Public Rivers.*

§ 554. All obstructions to the free use of such streams of water as are here under consideration, are prohibited by the law of the land, and belong to that class of offences against the public, which are denominated "public nuisances." A sense of the importance of preserving navigation unobstructed, in all navigable rivers, was manifested in England at a very early period, as is indicated by the laws relating to *sewers*, which are remarkable for their antiquity.³ Especially

¹ *Morgan v. Reading*, 3 Smedes & Marsh, (Mississip.) R. 366.

² *O'Fallan v. Daggett*, 4 Missou. R. 343.

³ *Callis on Sewers*, 25. The laws relating to Sewers in England are remarkable for their antiquity. In the Register, in *oyer* and *terminer*, are two several writs or commissions of this nature; the one authorizing certain persons to survey the defences in a part of the county of Lincoln; the other for viewing and surveying the surrounding grounds between the two

does it appear by the celebrated instrument of Magna Charta, which declares, "that *omnis kidelli deponantur de cetero penitus per Thamesiam et Medwayam et per totam Angliam*." The principle of this clause has been considered as discountenancing all obstructions to navigation; and therefore, on an information filed against the defendant for building locks on the Thames, Lord Chief Justice Holt said, that to hinder the course of a navigable river was against Magna Charta.¹ After Magna Charta, by the statute of Ed. III., c. 4, it was enacted, that "all mills, weirs, stanks, stakes, and kidells, which were levied and set in the time of king Edward I., and after, whereby *ships* and *vessels* were disturbed, should be cut and pulled down, without being relieved." This statute was confirmed by the statute of 45 Ed. III., which further provided, that "if any such annoyance be done, it shall be pulled down, and he who shall relevy such annoyance, and be thereof duly attainted, shall incur a penalty of one hundred marks to the king, to be levied by the estreats of the exchequer." The statute of 4 Hen. IV., c. 15, which

rivers Humber and Auckholm, in the same county. The first of these commissions is set down, *verbatim*, in Fitz. N. B. 113. The first statute which appears in print, wherein is a frame for a commission of sewers, is the stat. 6 Hen. VI. ch. 5. But the commissions contained in the Register, and in Fitz. N. B. were unquestionably long before that time, though they received additional aid and power from the statute just named. *Callis on Sewers*. Sir Edward Coke, in the case of the Isle of Ely, says (10 Rep. 141) that "the kings of England, before the making of any statute relative to sewers, might grant commissions for the surveying and repairing of walls, banks, and rivers; and that the first statute was in the time of Hen. III. ch. 9, which is in the first volume of the English statutes. As to the power given by an act of Parliament to the magistrates of the city of London to facilitate navigation by towing-paths on the river Thames, see *Rex v. Smith*, 2 Doug. R. 441.

¹ *Rex v. Clark*, 12 Mod. R. 615.

after reciting, that "by weirs, stakes, and kiddels in the water of the Thames, and in other great rivers through the realm, the *common passage of ships and boats be disturbed*, and also the young fry of fish be destroyed, &c., therefore this statute enacts, that all the former statutes thereof made, be holden, kept, and put in execution."¹ Again, by the statute of 12 Ed. IV., c. 7, all preceding statutes on the subject are confirmed, and penalties prescribed for their violation. These statutes show the sense of the importance which in early times in England was manifested, of the free and unobstructed passage of navigable rivers, and a long continued solicitude and determination to preserve it. By virtue of them, it is held by the courts of England, to this day, that weirs appurtenant to fishing places which obstruct the whole or a part of a navigable river, are illegal, unless they can be proved, that a license to construct them was granted by the crown before the reign of Ed. I.²

§ 555. All hindrances to navigation, whether by bridges, or in any other manner, without direct authority from the legislature, are public nuisances. Lord Hale, in his treatise *de portibus Maris*, notices the several nuisances which may be committed to ports as follows: tilting or choking up the port by sinking vessels, throwing out filth or trash; decays of wharves, piers, or quays; leaving anchors without buoys; building new weirs or enhancing old; the straitening of the port by building too far into the water; impeding the mooring of ships in the ground adjacent, if it has

¹ See *Robson v. Robinson*, 2 Doug. R. 307.

² *Williams v. Wilcox*, 8 Adol. & Ell. R. 314.

been anciently used without paying any thing for it; the towing or hauling of vessels up or down a river or creek, to or from a port town; and the suffering a port or public passage to be filled or stopped, is a nuisance in those who are bound to repair it.¹

§ 556. To construct and moor a floating storehouse or vessel, for the receiving and delivering of goods and merchandise in any public river, or any port or harbor, or in the basins, or in the docks thereof, is such permanent appropriation and exclusive occupation of a public river, and such an obstruction thereof to its free and common use, as to be indictable as a public nuisance.² Under an act of the legislature, giving an individual and his assigns the right of erecting and maintaining a dam upon navigable waters, if the dam is so constructed as to impede the navigation beyond what the act authorized; it will be held, that this renders it *pro tanto* a nuisance.³ And no amount of collateral benefit, resulting from any manner of obstruction to the local community, can divest it of such character; an abridgment of the right of navigation can only be justified when the erection is productive of a greater public benefit.⁴

§ 557. In *Rex v. Russell*,⁵ a point somewhat novel was presented. It was the trial of an indictment for a nuisance by erecting staiths in a river, and the jury

¹ *Russell on Crimes*, 485. See also *Bracklesbank v. Smith*, 2 Burr. R. 656.

² *Hart v. City of Albany*, 9 Wend. (N. Y.) R. 521.

³ *Renwick v. Morris*, 3 Hill, (N. Y.) R. 621; *Hogg v. Zanesville Canal Co.*, Wright, (Ohio,) R. 130.

⁴ *Gould v. Carter*, 9 Humph. (Tenn.) R. 369; *Rex v. Russell*, 6 B. & Cress. R. 566; *Commonwealth v. Bilderback*, 2 Pars. (Penn.) R. 447.

⁵ *Rex v. Russell*, 6 B. & Cress. R. 556.

were directed to acquit the defendants if they thought that the abridgment of the right of passage, occasioned by such erections, was for a public purpose, and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the Judge pointed out to the jury, that, by means of the staiths, coals were supplied at a cheaper rate, and in better condition, than they otherwise could be, which was a public benefit. It was held by Mr. J. BAYLEY and Mr. J. HOLROYD, that the above direction to the jury was proper; but the Chief Justice (Lord TENTERDEN) dissented; he being of opinion, that the price and condition of coals were points not properly to be taken into consideration in the question raised by the indictment; and that the question properly to have been taken was, whether the navigation and passage of vessels on a navigable river was injured by the erections in question.

§ 558. The public right of navigation seems to have ever been regarded as paramount to the right of fishery. That is, should an individual, in the exercise of the exclusive piscatory right,—which he has by virtue of riparian ownership, or which he has by a special grant in those waters, the right to the soil of which is *prima facie* in the government,—set a *seine* therein, he can have no redress if he is disturbed by the passage of water-craft. To determine, in such an event, which right should yield to the other, it is only necessary to consider the *nature* of the two rights, and it will appear obvious at once, that the right of navigation necessarily supposes a free passage, and from its nature excludes every interruption of it. This has been moreover so expressly decided in a case in the State

of New Jersey. M. *owned* a fishery on the Passaic river, and while his *net* was out in the river, P., who was the owner of a vessel, was navigating it, and in so doing he ran through and injured the net, so as to deprive M. of the use of it. The decision was, that the right of fishing must yield to the right of navigation, where the two rights come in conflict, and that where one right only can be enjoyed, that of navigation must be the one. At the same time, it does not swallow up and obliterate the right of fishery; and where both rights can at the same time be enjoyed freely and fairly, that of navigation has no authority to trespass upon and incommode the other. The right of navigation, though superior, does not take away the right of fishery, but only limits it; and limits it only so far as it interferes with its own fair, useful, and legitimate exercise. If the master of a vessel, under the pretence of exercising his right, should wantonly turn out of his regular course to run upon a net, or lie in wait till the net be spread, and then crowd sail to reach it; or if he should, unnecessarily and wantonly, anchor on fishing ground; in these, and in like cases, he is answerable in damages.¹

§ 559. In an action for disturbing plaintiff's fishery in the river Tweed, it was proved that the defendant's vessel was moored against a rock on the bank of the river, where she delivered her cargo; and that the plaintiff was prevented, by the situation of the vessel, from taking as many fish as he would have otherwise done. It further appeared, that vessels frequently lie there; and that there were mooring rings upon the

¹ *Post v. Munn*, 1 South. (N. J.) R. 61.

rock, to one of which was fastened the defendant's vessel. The opinion by Wood, B., was,—“All persons have a right to come there in ships, and to unload, moor, and stay as long as they please. Nevertheless, if they abuse that right, so as to work a private injury, they are liable to an action. The question will therefore be, whether the defendant has abused his right. The privilege of the plaintiff must be subservient to the right of the public. It would be of mischievous consequence, if the owner of a fishery could prescribe how and where they are to moor in a navigable river. The only case I remember like this, is where a man obstinately refused to move his ship from opposite a wharf, although it would have been just the same if he had moved a little one way or the other; and therefore he abused his right, and the plaintiff recovered. The defendant had a right to moor and remain where his ship lay, as long as convenience required. Yet if he acted wantonly and maliciously, for the purpose of injuring the fishery, the plaintiff is entitled to a verdict; but not otherwise.”¹

§ 560. Where the plaintiff stated in his declaration his possession of a fishery in a public navigable river, and of oysters and oyster brood lying in the bed of the river, and charged that the defendant, by negligent navigation of his vessel, at times of the tide unreasonable, placed her so that she struck against, and settled upon, the bed of the river, and destroyed large quantities of oysters and oyster brood; it was held, that a tidal navigable river is a highway at all times

¹ Anonymous, Durham Assizes, 1 Camp. R. 516, note.

and states of the tide, and is not suspended during such periods of the tide as leave the channel too shallow to float vessels; and that any grantee of the crown of the soil in such river, must take it subject to such right.¹

§ 561. Free and unobstructed navigation of streams naturally navigable, being a primary object, the legislature of a State may promote it by artificial means, and render the water *more* useful to the public for the purposes of transportation, though the privilege of fishing of the riparian owners may be thus impaired.²

5. Remedies in Cases of such Obstructions.

§ 562. The authors of all obstructions to the free navigation of public rivers are of course liable, at Common Law, as the authors of public nuisances, to *indictment*; ³ and if such obstructions are licensed by the legislature, or permitted by statute, it is incumbent on the defendant, in an indictment against him, to bring his case within the act of the legislature, as an exception.⁴ Certain persons, who were incorporated as a company, were authorized by the legislature to erect a dam across a river which was a public highway, in a certain manner, and within prescribed limits. They proceeded to erect the dam at or near the place, and an indictment at Common Law was found against them for thus causing a nuisance. It was held, that

¹ *Mayor, &c., of Colchester, v. Brooke*, 9 Jur. 1090; 7 Adol. & Ell. R. 339.

² *Hart v. Hill*, 1 Whart. (Penn.) R. 136.

³ *Russell on Crimes*, 274; *Rex v. Ward*, 4 Adol. & Ell. R. 384; *Gates v. Blencoe*, 2 Dana, (Ken.) R. 158.

⁴ *Commonwealth v. Church*, 1 Barr, (Penn.) R. 384.

judgment must be arrested, if the indictment contained no averment that the dam was beyond the limits prescribed in the charter, and does not, in any way, allege that the dam was not erected in pursuance of the authority given by the charter. The indictment was not for the violation of any statute, but for a nuisance upon a river which was a public highway. The statute modified the Common Law, and, so long as it should be in force, suspended the privileges previously enjoyed, which were inconsistent therewith; and the Common Law, so far as the modification in question extended, no longer existed.¹

§ 563. It is well known that public nuisances, of every description, are subject to be *abated*; the remedy by *abatement* being in all respects concurrent with that by indictment.² In *Arundel v. McCulloch*,³ the question was, whether the doings of the defendant, in cutting down and removing a bridge over a public river, erected without authority from government, were justifiable; and the Court declared it to be clear, that when *any* public way is unlawfully obstructed, any individual, who has occasion to use it in a lawful way, may remove the obstruction; and they considered it settled, that he may even enter upon the land of the party erecting or continuing the obstruction, for the purpose of removing it, doing as little damage as possible to the soil. As nothing more was done, than was necessary to procure a safe passage for the defendant's

¹ *The State v. Godfrey*, 11 Shep. (Me.) R. 232. See also *Rex v. Mayor, &c., of Liverpool*, 3 East, R. 86.

² *Coates v. New York*, 7 Cow. (N. Y.) R. 558; *Miles v. Hall*, 9 Wend. (N. Y.) R. 315; *Renwick v. Morris*, 3 Hill, (N. Y.) R. 621.

³ *Arundel v. McCulloch*, 10 Mass. R. 70.

vessel, the Court were satisfied that no trespass was committed by him. Yet an individual cannot abate a public nuisance, if he is no otherwise injured than as one of the public;¹ though the corporation of a city, whose duty it is to prevent obstructions in a navigable river, will be considered a party aggrieved, and may by its own act, without indictment, abate them as nuisances.² As lapse of time will not bar a prosecution for a public nuisance, and as the remedy by abatement is concurrent with that by indictment, although a public nuisance may have existed a very long time, (more than twenty years,) the remedy by abatement will not be barred.³

§ 564. The Common-Law remedies for a public nuisance will not be affected by a statute imposing a *penalty* for the offence, unless an intent is evinced to exclude these remedies;⁴ for, as a general rule, the simple addition of a penalty by statute for an offence at Common Law, is merely cumulative, and in the absence of a plain meaning to the contrary, such statute detracts nothing from the ordinary remedies at law.⁵ But the remedy by abatement cannot be applied to the erection of a dam which obstructs navigation, if an appropriate mode of redress is provided by the legislative act which authorizes it. By an act of the legislature of Pennsylvania, the erection of a dam was permitted, and the use of the water granted on the

¹ Mayor, &c., of Colchester v. Brooke, 7 Adol. & Ell. R. (N. S.) 339.

² Hart v. Mayor of Albany, in error, 9 Wend. (N. Y.) R. 571.

³ Russell on Crimes, (Amer. Ed.) 274; Renwick v. Morris, *ub. sup.*; Miles v. Hall, *ub. sup.*

⁴ Dwarris on Stat. 678, 679; Renwick v. Morris, 7 Hill, (N. Y.) R. 575.

⁵ Ibid.; Commonwealth v. Ruggles, 10 Mass. R. 391.

condition that there should be no interference with the navigation and passage of fish. It was by an excess beyond the limit prescribed, the Court held, that the act was violated, and the appropriate redress for such mischief, was not utterly to demolish and destroy the dam, but to remove that excess, and adapt the erection to the design of the law. This was provided for by the requisition of the act of the previous inspection of three commissioners; and by the direction of it, that, in case of conviction, the supervisors of highways should remove the grievance, by making the dam conform to the object of the act, at the cost of the owner.¹ One whose ark is obstructed by a dam in Penn's Creek, in Pennsylvania, cannot use the Common-Law remedy of abatement, but must resort to that provided by the statute.²

§ 565. But notwithstanding the above ordinary remedies for public nuisances, by indictment, and by the act of the party aggrieved, it is now well settled, that a Court of Equity may take jurisdiction of them, *by an information* filed by the Attorney-General. And the interposition of that Court in such cases, though rare, is said to be by no means a modern branch of equitable jurisdiction.³ The doctrine has been recog-

¹ *Criswell v. Clugh*, 3 Watts, (Penn.) R. 330.

² *Spigelmoyer v. Walter*, 3 Watts & S. (Penn.) R. 540. And see *Brown v. Commonwealth*, 3 S. & Rawle, (Penn.) R. 273.

³ *Eden on Injunct.* 262, who refers to an information filed by the Attorney-General in the reign of Elizabeth. It is now settled, that a Court of Equity may take jurisdiction in cases of public nuisance by an information filed by the Attorney-General; though the jurisdiction seems to have been acted on with great caution and hesitancy. Thus it is said, by Lord Eldon, that instances of the interposition of a Court of Equity, in England, upon the subject of public nuisances, are confined and rare, and none is to be

nized by the Supreme Court of Massachusetts, that where it is obviously necessary that a nuisance should be immediately suppressed, as in the case of a powder-house, or a slaughter-house, or a chemical laboratory, equity will interfere until the slower process by indictment can be put in motion.¹

§ 566. But the very fact, that there have been doubts on the subject of equitable jurisdiction in cases of public nuisances, should be sufficient to induce caution on the part of a Court of Equity; and in cases of public nuisance, there is an undisputed jurisdiction in the Common-Law Courts by indictment; and a Court of Equity ought not to interfere in a case of misdemeanor, when the object sought can be as well attained in the ordinary tribunals. A bill or information was filed in the Court of Chancery of New Jersey, by the Attorney-General, in the name of the State, charging the defendants with being in the act of erecting a bridge over the Passaic river, which is a

collected from what has been done in the Court of Exchequer upon discussion of the right of the Attorney-General, by some species of information, to seek on the equitable side of that Court relief as to nuisance, and if those terms may be used, preventive relief. *Attorney-General v. Cleaver*, 18 Ves. R. 211. Chancellor Kent, in 2 Johns. Ch. R. 382, remarks, that the equity jurisdiction, in cases of public nuisance, in the only cases in which it had been exercised, that is, in cases of encroachment on the king's soil, had lain dormant for a century and a half; that is, from Charles I. down to the year 1795. But the jurisdiction has been finally sustained, upon the principle, that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all, that it is confessedly one of delicacy, and accordingly, the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief before the tardiness of the law could reach it. *Georgetown v. Alexandria Canal Co.*, 12 Peters, (U. S.) R. 91.

¹ *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) R. 344.

navigable stream, in such a way as to interfere materially with the navigation; and it called upon the Court, on the ground that the bridge would be a serious detriment to the community and a public nuisance, to interfere and prevent the further erection of the same; and also to order the same to be abated. By the erection of the bridge, the information charged, great mischief and irreparable injury would ensue to the public. The application for an injunction was, however, denied, on the ground that a Court of Equity ought not to interfere in a case of misdemeanor, when the object sought can be as well obtained in the ordinary tribunals; and in this case, the proper course was by indictment at Common Law.¹ Still, in all cases of public nuisances requiring immediate suppression, the equity side of the Courts of Common Law in the United States have jurisdiction.²

§ 567. If an individual receives *spécial damage* from a public nuisance, it renders it, as regards him, a *private* nuisance, he having suffered to that extent beyond the rest of the community; and it has therefore been long well established, that he may maintain an action on the case ~~as~~ if it were a private nuisance, for such particular damage.³ In an action on the case for a nuisance, the declaration alleged, in substance, that the defendants wrongfully placed beams and spars in a certain navigable river, whereby the access from the river to the plaintiff's public house was obstructed, and "divers

¹ Attorney-General v. New Jersey Railroad and Transp. Co., 2 Green, (N. J.) Ch. R. 136.

² Georgetown v. Alexandria Canal Co., 12 Peters, (U. S.) R. 91.

³ Cary v. Brooks, 1 Hill, (S. C.) R. 365; Brown v. Scofield, 8 Barb. (N. Y.) Sup. Co. R. 239. But it seems that it does not follow that, be-

persons, who would otherwise have come to the plaintiff's house and taken refreshments there, were hindered and prevented from so doing." It was held, that the declaration did not state a public nuisance, and that even if it had done so, the plaintiff would have a right of action for the particular injury to himself; and that the general allegation of particular damage to himself was sufficient, and without alleging the loss of any particular customers.¹ The erection of a dam in navigable tide-water, under an act of the Pennsylvania legislature (of 23d March, 1803,) which causes the formation of an obstruction in the water below, subjects him who erected or maintains it to any damage, in an action on the case, which such obstruction may occasion to any navigator.² The Court, in a case in Maryland, left it for the jury to decide whether, by the obstruction of an embankment in the river Patapsco, the plaintiff had sustained special damage.³ An action on the case will lie by the owner of salt meadow on a navigable stream, for obstructing by a dam the natural ebb of the tide, and thereby injuring the grass on such

cause a person receives a special damage from a public nuisance, he can maintain a suit for the same, if there be negligence on his part. If a person may by the exercise of ordinary prudence avoid a personal injury arising from a public nuisance, and does not exercise such prudence, he cannot recover damages for the injury arising from it. *Irwin v. Sprigg*, 2 Bland, (Md.) Ch. R. 2. If, for example, a person knows that there is an obstruction in a street and he attempts to pass the place, when, in consequence of the darkness of the night, or of a rise of water over the street, he cannot see the obstruction, he has no reason to complain of the injury he may sustain on the occasion; he takes the risk upon himself. *President, &c. v. Dunsouchett*, 2 Cart. (Ind.) R. 586.

¹ *Rose v. Groves*, 8 Dowl. Pr. Cases, (N. S.) 61.

² *Bacon v. Arthur*, 4 Watta, (Penn.) R. 487.

³ *Harrison v. Sterrett*, 4 H. & McHen. (Md.) R. 540.

meadow.¹ Where the legislature of Massachusetts authorized a corporation to build a mill-dam across a navigable river, of a given height, and to keep up the same head of water throughout the year, but provided no remedy for any person whose lands should be thereby injuriously flowed, it was held that the remedy must be by an action at Common Law, and not by a process under the statute respecting mills.²

§ 568. If a dam is built on a navigable river, in conformity with the provisions of law, and the shute has been rendered innavigable by flood or accident, the owner of the dam would not be liable for damage occasioned thereby, before he had time to repair it; nor in an action for a private nuisance, would he be liable for an erroneous opinion as to the safety of running through the shute in its damaged condition.³

§ 569. In an action on the case for obstructing a public river to the plaintiff's injury, the declaration averred, that on, &c., at the county of M. (in which the suit was brought) the defendant built a dam across the east fork of White River, in said county, the said river being then and there navigable. It was held, that, after verdict, the declaration could not be objected to, for not stating more explicitly, that the river was a public highway.⁴

§ 570. An action on the case for a nuisance created by a dam, in a river which is a public highway, is *local*, and cannot be sustained elsewhere than in the county where the dam is erected; unless in the case where the

¹ Turner v. Blodget, 5 Met. (Mass.) R. 540, (note.)

² Cogswell v. Essex Mill Corp. 6 Pick. (Mass.) R. 94.

³ Roush v. Walter, 10 Watts, (Penn.) R. 86.

⁴ Tyrrell v. Lockhart, 3 Blackf. (Ind.) R. 136.

dam erected in one county, injures land which is situated in another; for then the action may be maintained in either county.¹

§ 571. It being well established, that a Court of Equity may interpose by the preventive remedy by *injunction*, in cases of alleged apprehended and irreparable mischief from private nuisances, and as *public* nuisances become *private* as regards an individual reasonably apprehending therefrom a particular injury to himself, he may file a bill in equity in respect of a public nuisance, under such circumstances.²

§ 572. But the principle undoubtedly is, that in case of a public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot stand in a Court of Equity unless he avers and proves some *special injury*.³ In an attempt to restrain the obstructing of a street, by the filing of a bill for an injunction, which averred that the defendant was building a house upon the street to the injury of the plaintiffs as owners of the lots on and adjoining the street, the injunction was granted, Chancellor Kent saying, that there was a special grievance to the plaintiffs, affecting the enjoyment of their property and the

¹ *Oliphant v. Smith*, 3 Penn. R. 180; and see *ante*, 427 – 433.

² See opinion of the Court, by Shaw, C. J., in *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) R. 344. Though the grant of a right to erect wharves, and employ steamboats, if destructive of the paramount rights of general navigation and fishing, may be void; the remedy is not by injunction, which is only applicable to *special injuries in violation of private rights*. *Delaware and Maryland Railroad Co. v. Stump*, 8 Gill & Johns. (Md.) R. 479. See as to remedies in equity for private nuisances, *ante*, § 444, *et seq.*

³ *Crowder v. Tinkler*, 19 Ves. R. 616; *Georgetown v. Alexandria Canal Co.*, *ub. sup.*; *Mohawk Bridge Co. v. Utica and Schenectady Railroad Co.*, 6 Paige, (N. Y.) Ch. R. 554.

value of it; that the obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs.¹ It was held by the same Court in 1834, that where lands are dedicated to the use of the inhabitants of a city or incorporated village, for a public square, a bill may be filed not only in the name of the corporation, to restrain the erection of a nuisance thereon, but the grantee of a lot adjoining such square, may file a bill to restrain the grantor from violating a covenant that it shall be kept open for the benefit of his lot; and he may join with the corporation in the suit.² In such cases it is not necessary that the Attorney-General should be a party, although the nuisance is one which subjects the author of it to indictment.³ Thus in *Sampson v. Smith*,⁴ the Vice-Chancellor said,—“Here the plaintiff represents that something has been done which is highly injurious to himself, and also to certain other individuals; which averment it was not necessary for him to make. In a case so constituted, I do not see, if the Attorney-General were a party, that I could make a decree which would bind the question between the defendant and the public; and, unless having the attorney a party, would enable me to make a decree which would bind the public, through the Attorney-General, it appears to me, that it is not necessary to make him a party.”

¹ *Corning v. Lowerre*, 2 Johns. (N. Y.) Ch. R. 439.

² *Trustees of Watertown v. Cowen*, 4 Paige, (N. Y.) Ch. R. 510.

³ *Spencer v. Birmingham and London Railway Co.*, 1 Cases relating to Railways and Canals, 159; *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91.

⁴ *Sampson v. Smith*, 8 Simons, Ch. R. 272.

A P P E N D I X .

A P P E N D I X .

ACTS FOR THE ENCOURAGEMENT OF THE ERECTION AND SUPPORT OF MILLS.

ACT OF MASSACHUSETTS.

ERECTION AND REGULATION OF MILLS.

SECTION 1. Any person may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream that is not navigable, upon the terms and conditions, and subject to the regulations hereinafter expressed.

SECT. 2. No such dam shall be erected, to the injury of any mill lawfully existing, either above or below it, on the same stream, nor to the injury of any mill site on the same stream, on which a mill or mill-dam shall have been lawfully erected and used, unless the right to maintain a mill on such last-mentioned site shall have been lost or defeated, by abandonment or otherwise; nor shall any mill or dam be placed on the land of any person, without such grant, conveyance, or authority from the owner, as would be necessary by the Common Law, if no provision relating to mills had been made by statute.

SECT. 3. The height to which the water may be raised, and the length of time, or period, for which it may be kept up in each year, shall be liable to be restricted and regulated by the verdict of a jury, as hereinafter provided.

SECT. 4. Any person, whose land is overflowed, or otherwise

injured by such dam, may obtain compensation therefor, upon his complaint before the Court of Common Pleas for the county where the land or any part thereof lies; provided that no compensation shall be awarded for any damage sustained more than three years before the institution of the complaint.

SECT. 5. The complaint shall contain such a description of the land, alleged to be flowed or injured, and such a statement of the damage, that the record of the case shall show, with sufficient certainty, the matter that shall have been heard and determined therein.

SECT. 6. The complaint may be filed in the Court in term time, or in the clerk's office in vacation, and in either case notice thereof shall be given to the owner or occupant of the mill, by delivering to him, or by leaving at his dwelling-house an attested copy of the said complaint, or if he is not found within the State, and has no dwelling-house therein, then by leaving such copy at the mill in question; or the complainant may, fourteen days at least before the sitting of the Court, at which his complaint may be brought, cause the owner or occupant of such mill or dam to be served with an attested copy of the complaint, by delivering or leaving such copy, in like manner as when the complaint is filed as aforesaid.

SECT. 7. The notice shall be given fourteen days at least before the term at which the complaint is to be heard, and it shall be served by any officer who is authorized to serve any other civil process between the same parties.

SECT. 8. The respondent may plead, in bar of the complaint, that the complainant has no estate or interest in the land, alleged to be flowed or injured, or that the respondent has a right to maintain his dam, for an agreed price, or without any compensation, or any other matter which may show that the complainant cannot maintain the suit; but he shall not plead, in bar of the complaint, that the land therein described is not injured by such dam.

SECT. 9. If any plea is filed by the respondent, the replication and other pleadings, and the trial of the issue, whether of law or of fact, shall be conducted in like manner as in actions at the Common Law.

SECT. 10. If, upon such a plea, the issue is decided in favor of the respondent, or if, in any stage of the proceedings, the complainant shall become nonsuit, or shall discontinue his suit, the respondent shall be entitled to his costs, to be taxed as in common civil actions.

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SECT. 11. If the issue is decided in favor of the complainant, or if the owner or occupant of the mill or dam shall, after due notice, neglect to appear, or shall be defaulted, or if there be no plea in bar, and no other legal objection to the proceeding, the Court shall, without any further pleadings in the case, issue a warrant for a jury to hear and determine the matter of the complaint.

SECT. 12. Either party may appeal to the Supreme Judicial Court, from the judgment of the Court of Common Pleas, upon any such plea in bar, and the cause shall be there heard and determined, as it ought to have been in the Court of Common Pleas; except, that if the judgment of the Supreme Judicial Court, in such case, shall be in favor of the complainant, the case shall be remitted to the Court of Common Pleas; who shall proceed therein in like manner as if such judgment had been rendered in that Court.

SECT. 13. The warrant shall be directed and served, and the jurors shall be drawn, summoned and returned, in the same manner, that is provided in the twenty-fourth chapter, with respect to a jury, returned on the complaint of any person, aggrieved by the laying out of a highway, and the jurors shall be required to attend, under the same penalty that is provided in the said chapter.

SECT. 14. All the proceedings, as to supplying a deficiency of jurors, and swearing and impanelling the jury, and in conducting the trial, either before the officer who serves the warrant, or before the person, who may be appointed by the Court to preside at the trial, and also as to the signing and returning of the verdict, and all the other proceedings, on the part of the officer and all others concerned in the case, shall be substantially the same, as are provided in the said twenty-fourth chapter, with respect to the case before mentioned.

SECT. 15. The jury, in estimating the damage to the land of the complainant, shall take into consideration any damage occasioned to his other land, by the dam, as well as the damage occasioned to the land overflowed, and they shall also allow, by way of set-off, the benefit, if any, occasioned by such dam to the complainant, in relation to his said lands.

SECT. 16. If the jury shall find that the complainant is not entitled to recover any damages, they shall return their verdict accordingly, and if it is allowed and recorded by the Court, judgment shall be rendered thereon for the respondent.

SECT. 17. If the jury find that the complainant is entitled to recover any damages, they shall assess the amount of such damages,

sustained within three years next preceding the institution of the complaint, and down to the time of rendering the verdict; and if the verdict is allowed and recorded by the Court, the complainant shall have judgment and execution.

SECT. 18. If it shall be alleged in the complaint, that the dam is raised to an unreasonable height, or that it ought not to be kept up and closed during the whole year, the jury shall decide how much, if any, the dam shall be lowered, and also whether it shall be left open any part of the year, and if any, what part, and shall state such decision as a part of their verdict.

SECT. 19. The jury shall also ascertain and determine by their verdict, what sum, if any, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that shall be thereafter occasioned by the dam, so long as it shall be used in conformity with the verdict, and also what sum in gross would be a just and reasonable compensation for all the damages to be thereafter occasioned by such use of the dam, and for the right of maintaining and using the same forever, in manner aforesaid.

SECT. 20. The complainant in such case, at any time within three months after the verdict is allowed and recorded, may elect to take the sum in gross, so awarded by the jury, for the right to maintain and use the dam forever, instead of receiving the annual compensation therefor; and if he shall make such election, he shall, within the said three months, cause the same to be entered on the record of the case in the clerk's office.

SECT. 21. The owner or occupant of the mill or dam in such case shall, within three months after such election is entered on the record, pay to the complainant, or secure to his satisfaction, the sum so due for the perpetual right to maintain the dam, with interest from the time of the verdict; and after the expiration of said three months, such owner or occupant shall lose all benefit of the provisions contained in this chapter, until the payment of said damages and interest.

SECT. 22. If the complainant shall not, within the said three months, cause an entry of his election to be made on the record, as before provided, he and all persons claiming under him shall be entitled to demand and receive, from whoever shall be the owner or occupant of the mill, the annual compensation so established by the jury, so long as the dam shall be kept up and maintained, unless the sum due in that behalf shall be increased or diminished, upon a new complaint, as hereinafter provided.

SECT. 23. The person who shall be entitled to receive the said annual compensation, or gross damages, shall have a lien therefor from the time of the institution of the original complaint, on the mill and mill-dam with their appurtenances, and the land under and adjoining the same and used therewith, provided, that such lien shall not extend to any sum due more than three years before the commencement of an action therefor.

SECT. 24. The party, entitled to the said annual compensation or gross damages, may maintain an action of assumpsit or debt therefor, in the Court of Common Pleas, against the person who shall own or occupy the mill when the action is brought, and shall therein recover the whole sum due and unpaid for the three years then last past, whoever may have owned or occupied the mill during that time, and the plaintiff shall be entitled to his full costs in such suit, although the sum recovered shall not amount to twenty dollars.

SECT. 25. The execution issued on such judgment, if not otherwise satisfied, may, at any time within thirty days after the judgment is rendered, be levied on the premises so subject to the lien; and the officer may thereupon proceed to sell the same, or so much thereof, as shall be necessary to satisfy the execution, and all charges of levying it, and he shall proceed in making such sale, in like manner in all respects as is provided with regard to the sale on execution of a right to redeem real estate that is mortgaged.

SECT. 26. Such sale shall be valid and effectual against all persons claiming the premises by any title that shall have accrued within the time covered by the lien.

SECT. 27. Any person, entitled to the premises sold as aforesaid, may redeem the same at any time within one year after the sale, upon paying to the purchaser, or the person holding under him, the sum paid therefor, with interest thereon, at the rate of twelve per cent. a year.

SECT. 28. The provisions of this chapter shall not affect the right to keep up, maintain, and use any water-mill and mill-dam now lawfully existing, except as is herein expressly provided.

SECT. 29. Every verdict, rendered in any proceeding under this chapter, shall be under the control of the Court to which it is returned, in like manner as in trials at the Common Law, and may be set aside for any sufficient cause; and in such cases a new trial shall be had, upon a new warrant or otherwise, as the case may require.

SECT. 30. No action shall be sustained at Common Law, for the

recovery of damages for the erecting, maintaining, or using any mill or mill-dam, except as is provided in this chapter.

SECT. 31. The party prevailing, in every suit under this chapter, shall be entitled to his full costs, unless where it is otherwise expressly provided.

SECT. 32. The Court shall award a reasonable compensation to the person who presides at the trial, and also to the officer who executes the warrant, which, together with the pay of the jurors and all other like charges, shall be advanced by the complainant, and shall be taxed and allowed in the bill of costs, if he shall prevail in the suit.

SECT. 33. When either party shall be dissatisfied with the annual compensation established by a jury, either under the provisions of this chapter, or those of the laws heretofore in force, a new complaint may be brought, for the increase or diminution of the said annual compensation, or for ascertaining the gross amount of the damages; and all the proceedings, for ascertaining and determining said compensation or damages, shall be conducted substantially in the manner before provided, in the case of an original-complaint; provided, that when any complainant has heretofore declined, or shall hereafter decline, to accept the amount of gross damages awarded him, no jury shall again determine the amount of gross damages, until the expiration of ten years thereafter.

SECT. 34. Such new complaint may be maintained, by and against either of the parties to the original suit, or by and against any person lawfully holding under either of them, respectively, as the case may require.

SECT. 35. No such new complaint shall be brought, until the expiration of one month after the payment of the then last year shall have fallen due, and either party may, within the said month, make an offer or tender to the other, in the manner hereinafter provided.

SECT. 36. The owner of the mill or dam may, within the said month, offer in writing, to the owner of the land that is injured, any increase of the annual compensation to be thereafter paid for maintaining and using the dam; and if the owner of the land shall not agree to accept the same, but shall bring a new complaint, in order to obtain an increase of the compensation, he shall not be entitled to costs thereon, but shall pay costs to the adverse party, unless he shall obtain a verdict for a greater annual compensation than was so offered to him.

SECT. 37. The owner of the land that is injured may also, within

the said month, offer in writing, to the owner of the mill or dam, to accept any smaller sum, than that which is established as the annual compensation, to be thereafter paid for maintaining and using the dam ; and if the owner of the mill or dam shall not agree to pay such reduced compensation, but shall bring a new complaint, in order to obtain a diminution thereof, he shall not be entitled to costs upon his complaint, but shall pay costs to the adverse party, unless the annnal compensation shall be reduced, by the verdict, to a sum less than that which was so offered to him.

SECT. 38. Such offer may be made by or to the respective tenants or occupants of the land, and of the mill or dam in question, in like manner and with the like effect, as if made by or to the respective owners, except that no agreement founded thereon shall bind the said owners, unless it be made with their consent.

SECT. 39. If the offer so made by either party shall be agreed to and accepted by the other, it shall establish the annual compensation to be thereafter paid, in like manner as if it had been established by a verdict and judgment upon a new complaint, provided, that a memorandum of such offer and acceptance, and of the agreement thereupon, be made and signed by the respective owners of the mill or dam and of the land, or by persons duly authorized by them, and filed and recorded in the clerk's office of the Court in which the former judgment was rendered, with a note of reference, on the record of the former judgment, to the book where the agreement is recorded.

SECT. 40. If, upon any complaint by the owner of the land alleged to be injured, the jury shall decide that he is not entitled to any annual compensation, the judgment thereon shall be no bar to a new complaint for damages, alleged to have arisen after the former verdict, and for compensation for the damages that may be thereafter sustained.

SECT. 41. In every case of an original complaint, brought by the owner of land alleged to be injured by a mill-dam, the respondent may bring into Court, and there tender, any sum that he shall think proper, to be paid to the complainant for the damages incurred up to the time of such tender, and also may offer to pay any certain annual compensation, for the damage that may be thereafter occasioned by the dam in question; and if the complainant shall not accept the same, with his costs up to that time, but shall proceed in the suit, to recover greater damages or compensation than is so offered, he shall be entitled to his costs up to the time of

the tender, and the respondent shall be entitled to recover his costs afterwards, unless the complainant shall recover greater damages or greater annual compensation than was so offered.

SECT. 42. If the complainant, in the case mentioned in the preceding section, shall consent to accept the amount, so offered for the past damage and the future annual compensation, he shall have judgment accordingly, and also for his costs up to that time, and the judgment shall have the same effect, as if it had been rendered upon the verdict of a jury, impanelled according to the provisions of this chapter; or the complainant may accept either the sum tendered for past damages, or the offer for future annual compensation, and proceed to trial on the residue of the complaint, under the same liability for costs as before provided.

SECT. 43. No complaint for flowing shall be abated, by reason of the death of any party thereto, but the same may be prosecuted or defended by the surviving complainants or respondents, or the executors or administrators of the deceased; and if any such complaint shall be abated or otherwise defeated, for any matter of form, or if, after verdict for the complainant, the judgment shall be reversed for error, upon a certiorari or otherwise, the complainant, or any person claiming from, by, or under him, may bring a new complaint, for the same cause, at any time within one year after the abatement or other determination of the original complaint, or after the reversal of the judgment therein, and may, upon the new complaint, recover such damages as shall have been sustained during the three years before the institution of the first complaint, or at any time afterwards.

ACT OF MAINE.

RELATING TO MILLS AND MILL-DAMS.

SECTION 1. Any man may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream that is not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

SECT. 2. No dam shall be erected to the injury of any mill, lawfully existing, either above or below it, on the same stream; nor to the injury of any mill site, on which a mill or mill-dam shall have been lawfully erected and used, unless the right to maintain a mill, on such last-mentioned site, shall have been lost or defeated by an abandonment, or otherwise.

SECT. 3. Nor shall any mill or dam be placed on the land of any person, without such grant, conveyance, or authority from the owner, as would be necessary by the Common Law, if no provision relating to mills had been made by any statute.

SECT. 4. The height to which the water may be raised, and the length of time during which it may be kept up in each year, shall be liable to be restricted and regulated by the verdict of a jury, or report of commissioners, as hereinafter provided.

SECT. 5. Any person sustaining damages in his lands, by their being overflowed by a mill-dam, may obtain compensation for the injury by complaint to the District Court in the county where the lands so flowed shall be situated, or any part of the same; but no compensation shall be awarded for any damages sustained more than three years before the institution of the complaint.

SECT. 6. The complaint shall contain such a description of the land, alleged to be overflowed and injured, and such a statement of the damage, that the record of the case shall show, with sufficient certainty, the matter that shall have been heard and determined therein.

SECT. 7. Such complaint may be presented to the Court in term time, or be filed in the clerk's office in vacation; and a copy thereof, in either case, shall be served on the person complained

of, by being delivered to him, or left at his dwelling-house, if he has any in the State; otherwise, it shall be left at the mill in question, or with the owner of the mill.

SECT. 8. Such service shall be made by the proper officer, fourteen days at least before the term at which the complaint is to be heard.

SECT. 9. The owner or occupant of such mill may appear and plead in bar to such complaint, that the complainant has no right, title, or estate in the lands, alleged to be flowed; or, that he has a right to maintain such dam and flow the lands for an agreed price, or without any compensation; or any other matter, which may show that the complainant cannot maintain the suit; but he shall not plead in bar of the complaint, that the land described therein is not injured by such dam.

SECT. 10. When any such plea is filed, and an issue in fact, or in law, is joined, it shall be heard and decided as similar issues are to be decided in cases at Common Law; and either party may appeal to the Supreme Judicial Court.

SECT. 11. If, on any such plea, the issue is decided in favor of the respondent, or the complainant shall become nonsuit, or discontinue the suit, the respondent shall be entitled to his costs, as in common actions.

SECT. 12. If the issue is decided in favor of the complainant, or, if the owner or occupant, after being notified as before mentioned, shall not appear, or shall be defaulted, or shall not plead or show any legal objection to proceeding, the Court shall appoint three or more disinterested persons of the same county, commissioners, who shall go upon and examine the premises, and make a true and faithful appraisement under oath of the yearly damages, if any, done to the complainant by the flowing of his lands, described in the complaint, and how far the same may be necessary; and ascertain and make report, what portion of the year such lands ought not to be flowed.

SECT. 13. If either party shall request that a jury may be impanelled to try the cause at the bar of the Court, the report of the commissioners shall, under the direction of the Court, be given in evidence to the jury; subject to be impeached by evidence from either party.

SECT. 14. If neither party shall request a trial of the cause by a jury, as before mentioned, the report of the commissioners may be accepted by the Court, and judgment rendered thereon.

SECT. 15. The verdict of such jury, or the report of such commissioners, where no trial is requested, being so accepted, shall be a bar to any action brought for such damages ; and such owner or occupant shall not flow such lands during any portion of the period, when such flowing is prohibited by the commissioners or the jury.

SECT. 16. The Court shall have power to award reasonable compensation to such commissioners, which shall be taxed and recovered by the prevailing party.

SECT. 17. Such verdict or accepted report of the commissioners, and judgment thereon, shall be the measure of the yearly damages, until the owner or occupant of such lands, or the owner or occupant of such mill, shall, on a new complaint to the Court, and by similar proceedings as in the former case, obtain an increase or decrease of such damages.

SECT. 18. When any person, whose lands shall be flowed as aforesaid, shall, on filing his complaint for ascertaining or increasing his damages, or, on bringing his action of debt, as provided in the twentieth section of this chapter, move the Court to direct the owner or occupant of such mill to give security for the payment of said annual damages, as they shall become due, and the Court shall so order, the owner or occupant, refusing or neglecting to give such security, shall have no benefit of this chapter ; but shall be liable to be sued for the damages occasioned by such flowing in an action at Common Law.

SECT. 19. The person entitled to receive such annual compensation, shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam, with the appurtenances and the land under and adjoining the same, and used therewith ; provided, that it shall not extend to any sum, due more than three years before the commencement of the action.

SECT. 20. The party entitled to such annual compensation, may maintain an action of debt or assumpsit therefor, before the proper tribunal, against the person who shall own or occupy the said mill, when the action is brought ; and shall therein recover the whole sum due and unpaid, with costs.

SECT. 21. The execution on such judgment, if not paid, may, at any time within thirty days, be levied on the premises subject to the lien ; and the officer may sell the same at public auction, or so much thereof in common with the residue, as shall be necessary to satisfy the execution ; proceeding, in giving notice of such sale, in

the same manner as in making sale of an equity of redemption upon execution.

SECT. 22. Such sale shall be effectual against all persons claiming the premises by any title which accrued within the time covered by the lien.

SECT. 23. Any person entitled to the premises may redeem the same within one year after the sale, on paying to the purchaser or the person holding under him the sum paid therefor, with interest at the rate of twelve per cent., deducting therefrom any rents and profits which may have been received by such purchaser or person holding under him ; and may have the same process to compel the purchaser to account, as might be had against a purchaser of an equity of redemption.

SECT. 24. When either party is dissatisfied with the annual compensation, established as before provided, a new complaint may be filed and similar proceedings shall be had, and conducted substantially in the manner, before provided in case of an original complaint.

SECT. 25. No new complaint shall be brought, until the expiration of one month after the payment of the then last year shall have become due, and one month after notice to the other party ; and the other party may, within that time, make an offer or tender, as hereinafter provided.

SECT. 26. The owner of the mill or dam, within said month, may offer in writing to the owner of the land injured, any increase of compensation to be paid thereafter for maintaining said dam ; and if the owner of the land shall not agree to accept the same, but shall bring a new complaint, for the purpose of increasing the compensation, he shall not recover any costs ; unless he shall obtain an increase of damages, in the manner before mentioned in this chapter.

SECT. 27. The owner of the land injured may also, within said month, offer, in writing, to the owner of the mill or dam, to accept any sum smaller than the annual compensation established, to be paid thereafter for maintaining said dam ; and if the owner of the mill or dam shall decline to pay such reduced compensation, but shall bring a new complaint to obtain a reduction of the same, he shall not recover costs, unless such compensation shall be reduced to a less sum than was offered.

SECT. 28. No action shall be sustained at Common Law for the recovery of damages, occasioned by the overflowing of lands as

before mentioned, except in the special cases provided in this chapter, to enforce the payment of damages after they have been ascertained by process of complaint, as aforesaid.

SECT. 29. The party prevailing shall recover costs, unless when it is otherwise expressly provided.

SECT. 30. Such offers may be made by or to the respective tenants or occupants of the land, and of the mill and dam in question, in like manner and with like effect, as if made by the respective owners; except, that no agreements founded thereon shall bind the owners, unless made by their consent.

SECT. 31. When an annual compensation upon the acceptance of one party, of an offer made by the other, is established and signed by the respective owners of the mill or dam, and of the land, and recorded in the office of the clerk of the Court in which the former judgment was rendered, with a reference on the record to the former judgment, to the book where the agreement is recorded, such agreement shall be as binding as a verdict and judgment on a new complaint.

SECT. 32. A judgment against a complainant, as not being entitled to any compensation, shall be no bar to a new complaint for damages, which have arisen after the former verdict, and for compensation for damages, subsequently sustained.

SECT. 33. In case of an original complaint, the respondent may tender and bring money into Court, as in an action at Common Law; and with the same advantages to himself; and if the money is accepted, the judgment shall have the same effect as if rendered on a verdict.

SECT. 34. No complaint for flowing lands shall abate by the death of any party thereto; but the same may be prosecuted or defended by the surviving complainants or respondents, or the executors or administrators of the deceased.

SECT. 35. If such complaint shall be abated or defeated for want of form, or if, after a verdict for the complainant, judgment should be reversed, the complainant may bring a new complaint at any time within one year after abatement or reversal as above stated; and thereon recover such damages as have been sustained during the three years next before the institution of the first complaint, or any time afterwards.

ACT OF RHODE ISLAND.

[Laws of Rhode Island, of 1844.]

AN ACT REGULATING WATER-MILLS.

SECTION 1. Where any person has set up or shall set up any water-mill upon his land, or upon the land of another, with his consent, the owner of such mill may continue and improve the pond and keep up the dam thereof on his land, for his advantage, without molestation.

SECT. 2. Any person aggrieved or injured by the flowing of the pond raised by such dam, or by the stopping or raising of the water either above or below said dam, or by the backing of water under his land, or by the flowing out of any fall of water in his land by means of such dam, may commence an action on the case before the Court of Common Pleas in the county in which such dam is, against the owner of said dam, or any precedent owner thereof; a copy of which writ shall be left by the officer serving the same in the office of the town clerk of the town in which such dam is; and the mill and mill-dam^e complained of, together with all their appurtenances and the land under and adjoining the same, shall thenceforth be pledged and liable for the damages which may be recovered in such action.

SECT. 3. Whenever it shall be adjudged by said Court that the plaintiff in any such action is entitled to damages, the defendant shall have the right to appeal from such judgment to the Supreme Court, upon the same terms and conditions as appeals are allowed in other cases; and in like manner the plaintiff may appeal whenever said Court shall adjudge that he is not entitled to damages: *provided, however*, that such appeal be claimed within five days after the rendition of such judgment, or during the same term of said Court, if said term shall not continue five days, by filing an appeal bond as in other cases.

SECT. 4. Whenever any plaintiff in any such action shall recover a final judgment for damages against the defendant, whether in the Court of Common Pleas or in the Supreme Court, the Court ren-

dering the same shall issue a writ of venire to the sheriff of said county or his deputy, to return twelve good and lawful men of the same county, to meet at a time and place appointed in such writ, in order to ascertain the amount of such damages, in manner as is hereinafter provided.

SECT. 5. At the time and place appointed by such writ, some one Justice of the Court issuing the same, not interested in the cause, shall attend said jurors ; shall engage them to a faithful and impartial discharge of their duty ; shall swear all witnesses produced by either party before them ; shall decide all questions of law that may arise incidentally in the trial, and may charge the jury upon the law, after the parties have submitted their evidence and arguments to them. If all the persons summoned as jurors do not appear, or are excused, such Judge may issue a venire to fill up the panel.

SECT. 6. Such jury shall appraise the damages which the plaintiff shall have sustained by the matters of complaint set forth in his writ and declaration, from the time of his ownership of the premises injured up to the date of the writ, if the defendant hath been so long owner of the mill-dam or pond ; if not, then from the time the ownership of the defendant commenced up to the date of the plaintiff's writ, or until the defendant ceased to be owner. And in addition to the foregoing, the said jury shall also appraise the damages that the plaintiff ought yearly to receive and recover of the defendant, his heirs and assigns, owners of said dam, from the date of the plaintiff's writ until five years after said dam shall be removed by the said defendant, his heirs or assigns. Said jury shall also appraise what sum would be a just and reasonable compensation to said plaintiff, for all damages done to him by the matters of complaint set forth in his writ, from the date of his writ ; which verdict, so rendered and signed by them, said Justice shall return to the Court issuing the venire, as soon as may be.

SECT. 7. If such verdict be returned to the Court of Common Pleas, either party aggrieved thereby may appeal, as is hereinafter provided, from the judgment of the Court accepting the same, to the Supreme Court, to be holden in the same county ; in which case said Supreme Court shall order a venire for and trial before another jury ; which shall be had in the same manner and subject to the same rules as is hereinbefore prescribed : *provided, however*, that if the verdict rendered on such appeal shall not be more favorable to the party appealing than the one appealed from, such party shall

recover no costs in such appeal, unless the same shall be adjudged him by the Court accepting such verdict, upon cause shown.

SECT. 8. Upon the return and filing of any such verdict, the Court to which it is returned shall continue the cause until the next term, before rendering any judgment, accepting the same; and the plaintiff shall, on or before the second day of said term, in writing, make his election between the yearly damages and the damages in gross found by said jury; and no appeal shall be had unless made within three days after such election, or during the said term of said Court, if said term do not continue said three days; which election of the plaintiff shall be entered on the records of said Court in said case, and shall be forever binding on said plaintiff and defendant and all claiming under them; and the judgment of the Court shall follow the election of the plaintiff. But if the plaintiff neglect to make any election within the time and in the manner hereinbefore prescribed, the Court shall enter up judgment in his favor for the yearly damages found by said jury; and the judgment so rendered shall bar all actions for the injuries complained of by the plaintiff, excepting only an action of debt on said judgment or *scire facias* to enforce the same.

SECT. 9. Any execution that may issue on any judgment for damages rendered as aforesaid, whether for yearly damages or damages in gross, shall run not only against the goods and chattels and body of the defendant and his real estate, as executions on other judgments, but if the defendant was owner of said mill at the date of the writ, also against the mill and mill-dam which was the occasion of said suit, with all the appurtenances thereof; and the form of the execution shall be varied accordingly by the Court issuing the same; and such execution may be levied thereon, and the same proceedings may be had as on executions in other cases levied on real estate.

SECT. 10. Any sale of said mill or mill-dam, and appurtenances thereof, made on such execution, shall be valid and effectual against the defendant, and against all persons whose titles shall accrue after the service of the writ in said action; but any person entitled to the premises sold, may redeem the same at any time within one year after the sale, upon paying to the purchaser or person holding under him, the sum paid therefor, with interest thereon at the rate of twelve per cent, per annum.

SECT. 11. Whenever any plaintiff shall elect to receive the

yearly damages awarded him as aforesaid, and the mill-owner shall afterward remove the matter complained of in the writ, for which said damages were awarded, the plaintiff or his assigns shall recover said damages for five years after said matters shall be removed, and no longer.

SECT. 12. The Justice of the Court of Common Pleas, or of the Supreme Court, who shall attend said jury in assessing damages, shall be entitled to compensation for his services and expenses, to be allowed by the Court and taxed in the bill of costs.

SECT. 13. If the plaintiff in any such action shall decease pending the same, his death shall not abate said action, but his executor or administrator, as in suits which survive, shall come in, and prosecute the same; but the jury assessing damages shall assess damages only up to the date of the plaintiff's writ, (which damages shall be assets in the hands of such administrator or executor,) and not yearly damages or damages in gross, unless the heirs at law or devisees of such deceased shall, in writing or in person, in open Court, consent to such appearance of the administrator or executor.

SECT. 14. No marriage of any party plaintiff, in any such action shall abate the same, if the new party in interest, upon the marriage being suggested by the defendant on the record, will at the same term, in writing or in person, in open Court, amend the process and enter himself as one of the plaintiffs in said action; but the costs in said action shall not be increased by said marriage.

SECT. 15. If several joint tenants, tenants in common, or coparceners, be plaintiffs in such a suit, and pending the same one or more of them shall sell his interest in the premises alleged to be injured, to one or more of his co-tenants, such action shall not thereby be abated, but the cause shall proceed to judgment with the same effect as if such conveyance had not been made.

SECT. 16. If there be several defendants in such a suit, and one or more of them die pending the same, the suit shall not thereby abate, but the cause shall proceed to judgment with the same effect as if such death had not occurred. And if there be but one defendant, and he die pending the same, his death shall not abate said action, if the devisees or heirs at law will come into Court at the term next following the decease, and substitute their names as defendants, instead of the deceased.

SECT. 17. No person owning any dam, on any river, or stream of

water, shall detain the natural stream thereof, at any one time, more than twelve hours out of twenty-four hours, except on Sundays, when he shall be requested by the owner of any dam, within one mile below on the same stream, to suffer the said natural run of said river or stream to pass his said dam.

ACT OF VIRGINIA.

[Passed March 2, 1819.]

AN ACT TO REDUCE INTO ONE, THE SEVERAL ACTS CONCERNING MILLS,
MILL-DAMS, AND OTHER OBSTRUCTIONS TO WATERCOURSES.¹

SECTION 1. *Be it enacted by the General Assembly*, That, when any person owning lands on one side of any watercourse, the bed whereof belongeth to himself, or to the Commonwealth, or owning lands on one side of a watercourse, the middle of the bed whereof shall be the dividing line between the lands of himself and any other person or persons, and desiring to build a water grist-mill, or other machine or engine useful to the public, on such lands, and to erect a dam across the same for working the said mill, or other machine or engine, shall not himself have the fee-simple property in the lands on the opposite side thereof, against which he would abut his dam, he shall make application for a writ of *ad quod damnum*, to the Court of the county wherein the lands proposed for the abutment are, having given ten days' previous notice to the proprietor thereof, if he be to be found in the county, and if not, then to his agent therein, if any he hath, which Court shall thereupon order their clerk to issue such writ, to be directed to the sheriff, commanding him to summon and impanel twelve fit persons, to meet upon the lands so proposed for the abutment, on a certain day, to be named by the Court and inserted in the said writ, of which notice shall be given by the sheriff to the proprietor or his

¹ Former Laws touching these subjects; 1 Hen. St. at Lar. p. 301, 348, 485; 2 Ibid. 127, 242, 260; 1705, 3 Hen. St. at Lar. p. 401, edit. 1733, Acts of 1705, c. 41; 1711, 4 Hen. St. at Lar. p. 53; 1738, 5 Hen. St. at Lar. p. 34; 1745, 5 Hen. St. at Lar. p. 359; 1748, 6 Hen. St. at Lar. p. 55, edit. 1752, c. 26, and edit. 1769, c. 20, 1785, c. 82; 1792, edit. 1794, 1803, and 1814, c. 105; 1806, c. 20, edit. 1808, c. 100; 1807, c. 19, edit. 1808, c. 127; 1813, c. 23; 1815, c. 29; Ibid. c. 46. The amendments made at the late revisal, are distinguished as far as practicable, by being printed within single inverted commas.

agent as before directed, if neither of them were present in Court at the time of the order made.¹

SECT. 2. The freeholders taken shall be charged by the said sheriff, impartially and to the best of their skill and judgment, to view the said lands, so proposed for an abutment, and to locate and circumscribe, by certain metes and bounds, one acre thereof, having due regard therein to the interests of both parties, and to appraise the same, according to its true value ; to examine the lands above and below, of the property of others, which may probably be overflowed, and say to what damage it will be of to the several proprietors, and whether the mansion-house of any such proprietor, or the offices, curtilage, or garden thereunto immediately belonging, or orchards, will be overflowed ; to inquire whether, and in what degree, fish of passage and ordinary navigation will be obstructed ; whether by any, and by what means, such obstruction may be prevented ; and whether, in their opinion, the health of the neighbors will be annoyed by the stagnation of the waters.²

SECT. 3. The inquest so made and sealed by the said jurors, together with the writ, shall be returned by the said sheriff to the succeeding Court, who shall thereupon order summonses to be issued to the several persons, proprietors, or tenants of the lands so located, or found liable to damages, if they be to be found within the county, and if not, then to their agents therein, if any they have, to show cause why the party applying should not have leave to build the said mill, machine or engine, and dam.³

SECT. 4. In like manner, if the person proposing to build such mill, machine or engine, and erect such dam, shall have the fee-simple property in the lands on both sides the stream ; or, owning the lands on one side of a watercourse, the bed whereof may be in the Commonwealth, shall desire to erect such mill, machine or engine, and to abut his dam on any rock or island in the said watercourse ; or in any other manner to extend his dam only in

¹ 1745, 5 Hen. St. at Lar. p. 359 ; 1748, edit. 1752, c. 26, § 1 ; and 1769, c. 20, § 1 ; which were amendments of 1705, 3 Hen. St. at Lar. p. 401 ; and edit. 1733, c. 41 ; vid. also 1785, c. 82, § 1 ; 1792, edit. 1794, 1803, and 1814, c. 105, § 1. This section compiled of the last mentioned, and 1806, c. 20, § 1, edit. 1808, c. 100, § 1.

² 1785, c. 82, § 1 ; 1792, edit. 1794, 1803, and 1814, c. 105, § 2.

³ Ibid. § 3.

part across such watercourse, not abutting it on the opposite bank ; he shall apply to the Court of the county, wherein the mill-house, machine or engine will stand, for a like writ ; which writ shall be directed, executed, and returned, as prescribed in the former case. The owner of such rock or island, or his agent, if to be found, either in the county in which such writ may be applied for, or in the county in which such rock or island may be, shall have like notice of the application for such writ and of the execution thereof, as is herein required to be given to the owner of land on the opposite side of a stream, or to his agent :¹ ‘ *Provided*, That, if such rock or island belong to the Commonwealth, notice as aforesaid shall be given to the attorney for the Commonwealth of that county in which the writ is applied for ; whose duty it shall be to defend the interest of the Commonwealth, in that behalf, in such Court.’

SECT. 5. If, on such inquest, or on other evidence, it shall appear to the Court, that the mansion-house of any proprietor, or the offices, curtilage, or garden thereto immediately belonging, or orchards, will be overflowed, or the health of the neighbors be annoyed, they shall not give leave to build the said mill, machine or engine, and erect the said dam ; but, if none of these injuries are like to ensue, they shall then proceed to consider whether, all circumstances weighed, it be reasonable, that such leave should be given, and shall give or not give it accordingly ; and, if given, they shall lay the party applying under such conditions for preventing the obstruction, if any there will be, of fish of passage, and ordinary navigation, ‘ and for preventing any impediment to the convenient crossing of the watercourse, on which the dam may be erected,’ as to them shall seem right.²

SECT. 6. If the party applying obtain leave to build the said mill, machine or engine, and erect the said dam, he shall, upon paying respectively to the several parties entitled, the value of the acre located, and the damages, which the jurors find will be done by overflowing the lands above or below, becomes seised in fee-simple of the said acre of land, and be authorized to proceed to erect such mill, machine or engine, and dam. But, if he shall not begin to build the same, within one year, and finish it within three years after such leave of the Court obtained, so that it be in good con-

¹ Compiled of 1792, edit. 1794, 1803, and 1814, c. 105, § 4 ; 1813, c. 23, § 1, 2 ; and new modelled at the late revisal.

² 1785, c. 82, § 1 ; 1792, edit. 1794, 1803, and 1814, c. 105, § 5.

dition for public use ; or, if such mill, machine or engine be at any time destroyed, or rendered unfit for public use, and the owner or occupier thereof shall not begin to rebuild or repair it, within one year, and finish such rebuilding or repair, so that it be in good condition for public use, within three years from the time of such destruction, or unfitness for use ; the title to any land, condemned under this act, shall revert to the former owner, his heirs or assigns, and the leave granted by the Court to erect any such mill, machine, engine, or dam, shall cease and be void : *Saving, however,* To all persons *non compos mentis*, infants, *femes covert*, or imprisoned, and to all persons out of this Commonwealth, in the service thereof, or of the United States, three years after their several disabilities removed, for the purpose of rebuilding or repairing any mill, machine, engine, or dam, belonging to them at the time of its destruction, or of its becoming unfit for public use : And *saving, also,* the rights of remainder-men and reversioners in the manner herein provided.¹

SECT. 7. If at any time, any tenant for life or years of any such mill, machine, or engine, (except those ejected, by such tenant himself, after the commencement of his estate,) which has been, or shall be destroyed, or which has become or shall become unfit for public use, shall have failed to commence or finish the rebuilding or repair thereof, within the time hereinbefore limited, it shall be lawful for the person or persons next entitled in remainder or reversion to such mill, machine, or engine, to enter thereupon, and to rebuild or repair the same, and to hold and enjoy it, with its appurtenances, for his own use and benefit : *Provided,* That such remainder-man or reversioner, (if under none of the legal disabilities herein enumerated at the time when such right shall accrue,) shall make such entry, and complete such rebuilding or repair, within three years from the time of such failure of the tenant for life or years ; or (if *non compos mentis*, an infant, *feme covert*, or imprisoned, or if out of the Commonwealth, in the service thereof, or of the United States) shall make such entry and complete such rebuildings or repairs, within three years after the disability removed.²

¹ Compiled of 1785, c. 82, § 2 ; 1792, edit. 1794, 1803, and 1814, c. 105, § 6 ; 1807, c. 19, § 1, edit. 1808, c. 127, § 1 ; and amended at the late revision.

² From 1807, c. 19, § 1, 2 ; edit. 1808, c. 127, § 1, 2.

SECT. 8. When any owner of a mill, machine, or engine heretofore or hereafter established by law, may think it necessary to raise his dam, the Court of the county wherein the pond lieth, upon application to them, shall grant a second writ of *ad quod damnum*, to value the additional damage done thereby, under the same rules and regulations as are hereinbefore directed.¹

SECT. 9. No inquest taken by virtue of this act, and no opinion or judgment of the Court thereupon, shall bar any public prosecution or private action, which could have been had or maintained if this act had never been made, other than prosecutions and actions for such injuries as were actually foreseen and estimated upon such inquest.²

¹ 1792, edit. 1794, 1808, and 1814, c. 105, § 8.

² Altered from 1785, c. 82, § 3; 1792, edit. 1794, 1803, and 1814, c. 105, § 7.

FORMS OF DECLARATIONS.

DECLARATION FOR DIVERTING THE WATER OF A RIVER FROM THE PLAINTIFF'S MILL.

2 *Chitty on Pleadings*, p. 384.

FOR that whereas the said A B, before and at the time of the committing of the grievances by the said C D hereinafter next mentioned, was and from thence hitherto hath been, and still is, lawfully possessed of certain iron and tin works, with the appurtenances, situate and being at, &c., and by reason thereof before and at the time of the committing of the grievances hereinafter mentioned, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse in the county aforesaid, which during all that time of right ought to have run and flowed, and until the diversion thereof hereinafter mentioned, of right had run and flowed, and still of right ought to run and flow unto the said works of the said A B for the supplying the same with water for the working thereof, to wit, at, &c., aforesaid. Yet the said C D, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and prejudice the said A B in this respect, and to deprive him of the use, benefit, and advantage of the water of the said stream, and to hinder and prevent him, the said A B, from working his said iron and tin works in so ample and beneficial a manner as he had theretofore done, and of right ought to have done, and to injure him in the way of his trade and business of a manufacturer of tin plates, which he, during all the time aforesaid, exercised and carried on, and still doth exercise and carry on, at the said works; and to put him to great charge, expense, trouble, and inconvenience, whilst he, the said A B, was so possessed of the said iron and tin works, with the appurtenances aforesaid, and so exercised and carried on his said trade and business therein, to wit, on, &c., and on divers other days and times; between that time and the day of exhibiting the bill of the said A B against the said C D in this behalf, wrongfully and injuriously cut, dug, and made, and caused to be cut, dug, and made, in and

out of the sides of the said stream or watercourse above the said works, divers, to wit, — sluices, — trenches, — channels, and — cuts, of great depth and width, to wit, of the width of — feet, and of the depth of — feet, and kept and continued, and caused to be kept and continued, the said sluices, trenches, channels, and cuts, on the sides of the said stream or watercourse, for a long space of time, to wit, from thence hitherto and thereby during all the time aforesaid, unlawfully and wrongfully diverted, and turned divers large quantities of the water of the said stream or watercourse out of and away from the said iron and tin works of the said A B, and stopped, prevented, and hindered the water of the said stream or watercourse from running or flowing along its usual course to the said works, and from supplying the same with water for the necessary working thereof, as the same of right ought to have done, and otherwise would have done, and by reason thereof the water of the said stream or watercourse, sufficient for the supplying of the said works of the said A B during all or any part of that time, could not, nor did run or flow to the same, as the same of right ought to have done, and otherwise would have done, and the said A B thereby, for want of such sufficient water, could not, during that time, use his said iron and tin works, or follow, use, or exercise his said trade or business therein, in so large, extensive, and beneficial a manner as he might and otherwise would have done, but was thereby during all that time deprived of the use and enjoyment of his said works, and of all the benefits, profits, gains, and advantages, which he otherwise might and would have made, by carrying on his trade and business therein, to wit, at, &c., aforesaid. (*Second count, stating a general diversion of the water without showing the means.*) And whereas also the said A B, before and at the time of the committing the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of certain other iron and tin works, with the appurtenances, situate and being at, &c., aforesaid, near to a certain other stream or watercourse there, and which said last-mentioned stream or watercourse, before and at the time of the committing of the grievances hereinafter next mentioned, had run and flowed, and been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow, in great plenty and abundance, unto the said last-mentioned works of the said A B for the supplying of the same with necessary water for the working thereof, to wit, at, &c., aforesaid.

Yet the said C D, well knowing the said last-mentioned premises, but contriving and intending to injure and prejudice the said A B in this behalf, and to deprive him of the use, benefit, and advantage of the water of the said last-mentioned stream or watercourse, and to deprive him of the benefit and profits of his said last-mentioned works, and of his trade and business as manufacturer of tin plates as aforesaid, and to put him to great charge, trouble, expense, and inconvenience, whilst he, the said A B, was so possessed of the said last-mentioned works, with the appurtenances as aforesaid, and carried on his said business therein, to wit, on, &c., and on divers other days and times, between that day and the day of exhibiting this bill, wrongfully and unjustly diverted and turned divers large quantities of the water of the said last-mentioned stream and watercourse out of the same and away from the said last-mentioned iron and tin works of the said A B, and hindered and prevented the water of the said last-mentioned stream or watercourse from running or flowing along its usual course to the said last-mentioned works of the said A B, and from supplying the same with water for the necessary working thereof, as the same ought to have done, and otherwise would have done, and by reason thereof the water of the said last-mentioned stream or watercourse, sufficient for the supplying of the said last-mentioned works, during that time, could not nor did run or flow to the same as the same ought to have done, and otherwise would have done, and the said A B for want of such sufficient water, could not during that time use his said last-mentioned works, or follow, use, or exercise, his trade and business therein, in so large, extensive and beneficial a manner as he ought to have done, and otherwise would have done, but was thereby, during all that time, deprived of the use and enjoyment of the said last-mentioned works, and of all benefit, profit, gain, and advantage, which he otherwise might and would have made, by carrying on his said trade and business therein, to wit, at, &c., aforesaid. (*Third count for not keeping the banks of the river in repair.*) And whereas, also, the said A B before and at the time of the committing of the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of certain other — works, with the appurtenances, situate and being at, &c., aforesaid, near to a certain other stream or watercourse there, and which said last-mentioned stream or watercourse, before and until the time of committing the grievances hereinafter mentioned, had run and flowed, and had been used and accustomed

to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow, in great plenty and abundance unto the said last-mentioned works of the said A B, for the supplying of the same with necessary water for the working thereof, to wit, at, &c., aforesaid. And whereas the said C D before and at the time of the committing of the same grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, possessed of divers, to wit, — closes of land, on the banks and sides of the said last-mentioned stream or watercourse, and the said C D, by reason thereof, during all the time aforesaid, of right ought to have repaired and amended, and still of right ought to repair and amend such part of the banks of the said stream or watercourse, which are situate within, and parts of the same closes, as occasion hath required, or should require to prevent the water of the said last-mentioned stream or watercourse from escaping or running from the same, through the said banks, through the defects and insufficiencies thereof. Yet the said C D, well knowing the said last-mentioned premises, but contriving, and intending wrongfully and unjustly to injure, prejudice, and aggrieve the said A B in this behalf, and to deprive him of the use, benefit, and advantage of the water of the said last-mentioned stream or watercourse, and of the benefits and profits arising from his exercising and carrying on his said trade and business in the said last-mentioned works as aforesaid, whilst he, the said A B, was so possessed of the said last-mentioned works, with the appurtenances as aforesaid, and carried on his said trade and business therein, to wit, on, &c., and from thence for a long space of time, to wit, hitherto wrongfully and unjustly suffered and permitted the said banks to be and continue, and the same during all that time were ruinous and in bad condition for want of needful and necessary repairing and amending of the same, whereby divers large quantities of the water of the said last-mentioned stream or watercourse, which otherwise would have run and flowed to the last-mentioned works of the said A B, and have worked the same on the said, &c., and on divers other days and times, between that day and the day of exhibiting the bill aforesaid, escaped and run from and out of the said last-mentioned stream or watercourse, through the said defects and insufficiencies of the said banks, and became and were wholly lost to the said A B, and never did run or flow to the said last-mentioned works, for the working thereof, as the same ought to have done, and otherwise would have done, and thereby the said A B, for want of the

same water, could not, during all or any part of the time last aforesaid, use or work his said last-mentioned works, or follow, use, or exercise his said trade or business therein, in so large, extensive, and beneficial a manner as he ought to have done, and otherwise would have done, and was thereby, during all that time, deprived of the use and enjoyment of his said last-mentioned works, and of the benefits, profits, and advantages which he otherwise might and would have derived and acquired from carrying on his said trade and business therein, to wit, at, &c., aforesaid. (*Fourth count, for widening, &c., cuts from the stream.*) And whereas, also, the said A B, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of certain other — works, with the appurtenances, situate and being at, &c., aforesaid, near to a certain other stream or watercourse, which before, and until the time of the committing of the grievances by the said C D, as hereinafter mentioned, had run and flowed, and had been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow, in great plenty and abundance, unto the said last-mentioned works of the said A B, for the supplying of the same with necessary water for the working thereof, to wit, at, &c., aforesaid. Yet the said C D, well knowing the said last-mentioned premises, but contriving and intending unlawfully and wrongfully to injure and prejudice the said A B in this behalf, and to deprive him of the use, benefit, and advantage of the water of the said stream or watercourse, and to deprive him of the benefit and profit of his said last-mentioned works and his trade and business as such manufacturer as aforesaid, and to put him to great charge, trouble, expense, and inconvenience, whilst he the said A B was so possessed of the said last-mentioned works, with the appurtenances as aforesaid, and carried on his said business therein, to wit, on, &c., aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, wrongfully and injuriously widened, deepened, and enlarged, divers, to wit, — fenders, — sluices, — cuts, and — watercourses, leading from and out of the said stream or watercourse in this count first above-mentioned, and thereby, on those several days and times, drew off and diverted from the same stream or watercourse a much greater quantity of water than had before then used to flow or ought then to have flowed from the said stream or watercourse, and away from the said last-mentioned works of the said A B, and hindered

and prevented the water of the said last-mentioned stream or watercourse from running or flowing along its usual course to the said last-mentioned works of the said A B, and from supplying the same with water for the necessary working thereof, as the same ought to have done, and otherwise would have done, and wrongfully and injuriously kept and continued the said fenders, sluices, cuts, and watercourses, so widened, deepened, and enlarged, and the water so drawn off in larger quantities as aforesaid, from thence hitherto and by reason thereof, the water of the said stream or watercourse, sufficient for the supplying of the said last-mentioned works, during all or any part of that time, could not, nor did run or flow to the same, as the same ought to have done, and otherwise would have done, and the said A B, thereby, for want of such sufficient water, could not, during all or any part of that time, use his said last-mentioned works, or follow, use, or exercise his trade and business within, in so large, extensive, and beneficial a manner as he ought to have done, and otherwise might and would have done, but was thereby, during all that time, deprived of the use and employment of the said last-mentioned works, and of all the profits, benefits, and advantages, which he otherwise might and would have made by carrying on his said trade and business therein, to wit, at, &c., aforesaid.

ANOTHER FORM FOR DIVERTING A WATERCOURSE.

Oliver's American Precedents, 302.

For that whereas the plaintiffs, on, &c., and ever since have been, and still are seised in their demesne as of fee, of two corn-mills in, &c., with their appurtenances, and the plaintiffs and those whose estate they have in said mills, have, time out of mind, had the free course of the water at Ipswich river, to and from the said mills, for the use thereof, and the sole privilege of serving the inhabitants of Ipswich aforesaid, in grinding their corn for the accustomed and lawful toll, while they may be duly served by the said mills, till the plaintiffs were disturbed and hindered therein, by the said D.; and the plaintiffs ought accordingly to hold said mills with the privileges aforesaid, freely and undisturbed; yet the said D., in no wise ignorant of the premises, but maliciously con-

triving to disturb the plaintiffs in the enjoyment of their said mills, with the privileges and appurtenances thereof aforesaid, and deprive them of the profits thereof, on or about, &c., erected a certain corn-mill in Ipswich aforesaid, on Ipswich river aforesaid, at the falls a little below the plaintiffs' mills aforesaid, with a dam to the same, and have continued and improved the same ever since, and still do so; whereby they are continually drawing a great deal of the plaintiffs' water, and grind much of the corn of the said inhabitants of Ipswich, while they might be duly served by the plaintiffs' mills aforesaid, and cause a backwater that hinders a free course of the stream of Ipswich river aforesaid, from the plaintiffs' said mills, to the great nuisance of the plaintiffs' mills aforesaid, the destruction of the privileges thereof aforesaid, and to the damage, &c.

ANOTHER FORM FOR THE SAME.

Oliver's American Precedents, 304.

For that the plaintiffs, on, &c., last past, were, and ever since have been, and now are, seised of a certain water-mill, called a corn or grist-mill, with the appurtenances, situate in M. aforesaid, commonly called and known by the name of Swan's Mill, in their own demesne, as of fee; and that the plaintiffs, and all those whose estate they now have in the said mill, with the appurtenances, had, and from the time whereof the memory of man runneth not to the contrary, were used to have, and now ought to have, a certain watercourse, called and known by the name of Spicket River, running to their said mill; and being so seised, the said D., not being ignorant of the premises, but intending to injure the plaintiffs and deprive them of the use and profit of their said mill, did at M. aforesaid, on, &c., aforesaid, and on divers times and days between that time and the — day of, &c., dig up and remove the banks of said watercourse, and divert a great part of the water thereof, so running as aforesaid, from their said mill, so that the said mill, which before was able and was used to grind fifty bushels of corn in every twenty-four hours, now, and during the time aforesaid, by reason of the diversion aforesaid of the said water, is and was able to grind only four bushels of corn in every four-and-twenty

hours; by reason of which the plaintiffs, for all that time, have lost and have been deprived of the profits of their said mill, and still continue deprived thereof; to the damage, &c.

DECLARATION FOR ERECTING A DAM ABOVE PLAINTIFF'S DAM.

Oliver's American Precedents, 302.

For that the plaintiff, ever since the — day of, &c., has been seised in his demesne, as of fee, and has been in actual possession of an ancient grist-mill or water-mill to grind corn, situate on a rivulet or stream in, &c., called, &c., together with an ancient dam, to raise a head of water so high as should be necessary for said mill, and of having the whole water of said stream, without obstruction or impediment, flow into said pond, for the benefit of said mill, as ancient rights and privileges appurtenant to said mill; yet the said D. hath since, to wit, on, &c., unjustly erected a new dam across the said stream, above the plaintiffs' dam aforesaid, within the limits of the plaintiffs' pond and ground, that he had a right to flow, and thereby cut off part of his said pond, ponded the water above, and stopped the natural course of the water with which it anciently used to run into the plaintiffs' pond; and still continues his new-erected dam and obstruction aforesaid, thereby frequently stopping the water from coming to the plaintiff's said mill, and obliging the same to stand still for want of water, and at other times, letting out the water through said new dam, so suddenly, and in such large quantities, as to waste and tear away a great part of the plaintiff's said dam; whereby the plaintiff's mill aforesaid, of the yearly value of, &c., is rendered useless; all which is to the damage, &c.

DECLARATION FOR MAKING BACKWATER.

Oliver's American Precedents, 303.

For that the plaintiffs (husband and wife) were, on, &c., and unto this day are, seised in right of said E. in their demesne, as of

fee, of a certain close of about four acres of land, and of a certain water-mill thereon standing, with the appurtenances, all situate in said S. And the plaintiffs, and all whose estate, they, in right of said E., have in said close and mill, from time whereof the memory of man runneth not to the contrary, have had, until obstructed by said D., the free course and use of a stream of water, running, &c.; and the plaintiffs still ought to have and hold the same, free and undisturbed; whereof the said D. was well knowing, and contriving to deprive the plaintiffs of their profits of their said mill and close, there, on, &c., did erect a dam across said stream, in the aforesaid close of said D., and threw a great number of stones into said stream, on the easterly side of said mill, and the same continued until the —— day of, &c., and thereby raised the stream twelve inches above its usual and due height, and caused a back-water, hindering the free course of said stream from the said mill, to the great nuisance thereof; and thereby obstructed and prevented the plaintiffs in the use of their said mill, and deprived them of the profits thereof, for divers days and times between said, &c.; all of which are, &c.

DECLARATION FOR OVERFLOWING PLAINTIFF'S MEADOW.

Oliver's American Precedents, 304.

For that the plaintiff, on, &c., and long before, and ever since, was and is seised of his demesne, as of fee, and actually possessed of a certain parcel of meadow land, containing by estimation —— acres, with the appurtenances, situate in, &c., bounded, &c.; and whereas the water from the said brook, [*mentioned in the boundaries*] from the time whereof the memory of man runneth not to the contrary, in its natural channel, was wont to run; yet the said D., not ignorant of the premises, but maliciously intending to deprive the plaintiff of the use and profit of his said —— acres of meadow land, on, &c., and continually afterwards, by the space of one year then next following, the ancient course of the water of said brook, at, &c., aforesaid, with a certain sluice in the easterly side of said brook, on, &c., erected by him the said D., did obstruct; by reason of which obstruction, the water of said brook, overwhelming the banks thereof towards the said —— acres of meadow land,

wholly overflowed the same, and thereby spoiled, carried away, and destroyed — hundred weight of the plaintiff's hay, on the said meadow land, then and there lying, and being of the value of — dollars; whereby the plaintiff lost said hay, and was deprived of the profit of said — acres of land, for a length of time, to wit, from, &c., to, &c.; all which, &c.

DECLARATION FOR OVERFLOWING MEADOW BY ERECTING A DAM.

Oliver's American Precedents, 305.

For that the plaintiff, ever since the — day of, &c., has been lawfully seised and possessed of a tract of meadow land, in, &c., containing, &c., bounded, &c.; all of which the said D. was well knowing; but the said D., minding and contriving to injure the plaintiff, and deprive him of the benefit of his meadow land, hath ever since the said — day of, &c., maintained and kept up, and continued a mill-dam, in, &c., aforesaid, across a brook, there commonly called Stony Brook; and by means thereof caused the water of the brook aforesaid to overflow and drown the plaintiff's meadow land aforesaid, ever since the said — day of, &c.; whereby the plaintiff's grass, growing in his meadow aforesaid, within the time aforesaid, and of the value of — dollars, has been made worse, damnified, and destroyed; and his meadow land aforesaid is become spongy, rotten, and impassable; and the plaintiff has also, during the time aforesaid, thereby been prevented clearing his said meadows.

DECLARATION FOR THE SAME AND SPECIAL DAMAGE.

Oliver's American Precedents, 305.

For that whereas the plaintiff, on, &c., at, &c., was and ever since hath been seised in fee of three acres of meadow land, situate, &c., lying on each side of the brook, commonly called Steep Brook, and bounded, &c., and the said D., by means of a mill-dam, by him, on, &c., erected on his own land and across said

brook, in, &c., aforesaid, and by him ever since the said — day of, &c., continued there across the brook aforesaid, hath obstructed and stopped the natural course of the water of the brook aforesaid, and thereby caused it to overflow and drown the plaintiff's meadow aforesaid, ever since the said — day of, &c.; whereby the plaintiff's grass, growing on the same meadow, in that time, of the value of, &c., hath been greatly damnified, his meadow aforesaid made spongy, rotten, and good for nothing, and forty lengths of the plaintiff's four-rail fence, of the value of — dollars, on the said meadow at the time aforesaid standing, has been taken up and carried away.

DECLARATION FOR CUTTING A WATER-PIPE WHICH CONVEYED WATER TO PLAINTIFF'S HOUSE, WHEREBY THE PLAINTIFF WAS DEPRIVED OF WATER, AND PUT TO GREAT TROUBLE AND EXPENSE IN PROCURING WATER FOR HIS NECESSARY USE.

8 *Wentw.* 567.

For that whereas the said plaintiff heretofore, to wit, on, &c., was, and from thence hitherto hath been, and still is, lawfully possessed of and in a certain messuage or dwelling-house and yard thereto adjoining, with the appurtenances, situate and being at, &c., in which said messuage or dwelling-house the said plaintiff and his family, during all the time aforesaid, inhabited and dwelt: And whereas, long before and at the time of the committing of the grievance hereinafter next mentioned, there was a certain wooden pipe, lying and being under ground near to the said messuage of him the said plaintiff, by and through the means of which said pipe, and of a certain leaden pipe fastened in and affixed to the same, and extending and coming from the aforesaid wooden pipe unto and into the aforesaid yard of the said plaintiff, and the said plaintiff, and all others of the occupiers and possessors of the said messuage, &c., were, during all the time aforesaid, used and accustomed to be, and were supplied, and still ought to be supplied with water, to be used, spent, and employed by the occupiers and possessors of the said messuage, &c., with the appurtenances respectively; yet the said defendant, well knowing the premises aforesaid, but contriving and maliciously intending wrongfully and unjustly to hurt, injure, and prejudice the said plaintiff, and to deprive him

of water for the necessary use of the said plaintiff and his family residing in the said messuage, &c., whilst the said plaintiff was so possessed of the said messuage, &c., to wit, on, &c., at, &c., wrongfully and unjustly, injuriously and maliciously, cut into and through the aforesaid wooden pipe, and separated and divided the same, and caused and procured the said wooden pipe to be cut into and through, and separated and divided, and wrongfully and injuriously kept and continued the said pipe so cut into and through and separated and divided, for a long space of time, to wit, for the space of twelve months then next following; whereby he the said plaintiff was for a long space of time, to wit, for and during all the time aforesaid, wholly deprived of water to be used, spent, and employed by him the said plaintiff and his family in the said messuage, &c., of him the said plaintiff, and was thereby, during all the time, put to great trouble and inconvenience, and was forced and obliged to, and did lay out and expend divers sums of money, to wit, in the whole amounting to a large sum of money, to wit, the sum of twenty pounds, in, and about the furnishing and supplying of water for the necessary use and purposes of him the said plaintiff and his family in his said messuage, or, &c.; and he the said plaintiff was, hath been, and is, on occasion of the committing of the grievance aforesaid, otherwise greatly injured and damnified, to wit, at, &c., aforesaid.

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